88-1019

Supreme Court, U.S.
FILED
NOV 25 1988
JOSEPH F. SPANIOL, JR.
CLERK

SUPREME COURT OF THE UNITED STATES

No.

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OCTOBER TERM, 1988

HERBERT D. BERKSON,

Petitioner

v.

DEL MONTE CORPORATION, ET AL,

Respondents.

---

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

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# PETITION OF HERBERT D. BERKSON

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HERBERT D.. BERKSON
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45 pp

Other Defendant Parties

United Brands Company, William A. Rogers, Henry A. Kissinger, Price Waterhouse, Palmer & Dodge, Goodwin, Procter & Hoar, Pillsbury, Madison & Sutro, Covington & Burling and Nathaniel Davis

## ISSUES PRESENTED

1. Does the Statute of Limitations apply to persons and/or entities who violated the Anti-Deficiency Act of 1977 as surrogates of the Central Intelligence Agency (CIA) and the United States Department of Justice in depriving a citizen of his contractual rights and property without due process of law and just compensation?

2. Did the Appeals Court of the First Circuit err in its ruling that the petitioner did not bring a timely action under the Racketeer Influenced and Corrupt Organizations Act (RICO)?

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## PROCEDURAL HISTORY

This matter arose when the petitioner and his associate, Julian Presa, in the Pan-Tropic Fruit Company were approved by the Guatemalen Government as the purchaser of the United Fruit divestiture properties in Guatemala pursuant to a judgment issued by

the Federal District Court of Eastern Louisiana.

The US Justice Department, the Del Monte Corporation and the United Fruit & Brands Company appeared before Judge Seybourn Lynne in the Federal District Court in Birmingham, Alabama, on November 29, 1972 for the purpose of obtaining the Court's approval of the sale of the divestiture properties in Guatemala to DelMonte.

The petitioner appeared pro-se as amicus curiae at the hearing on November 29, 1972, alleging that his associate, Julian Presa, a Guatemalan national, was being harassed and threatened by United Fruit and DelMonte in Guatemala in an effort to keep the Presa group from bidding for said properties. However, the Presa group, which included the petitioner, did, in fact, make a bid.

The petitioner, appearing pro-se before Judge Lynne at said hearing, filed a brief alleging that the actions of United Fruit and

Del Monte were in violation of the divestiture decree of 1958 as a result of their concerted efforts to have DelMonte, and DelMonte alone, the exclusive purchaser. The Court was also informed that the Presa group not only had the approval of the Guatemalan government to become the purchaser but that its bid was equal to that of DelMonte.

Judge Lynne issued a decree allowing the purchase without comment of any kind on the claims of the petitioner.

The Justice Department being a party and represented by John Wilson, the overseer of the consent decree of 1958, assented to DelMonte's purchase.

As a result of the Wall Street Journal article of July 14, 1975, which exposed Del Monte's questionable payments in Guatemala (circa 1972) (documented in record of the Court below), the petitioner started a law action against United Fruit and DelMonte claiming violations of the consent decree of 1958 and continuing restraint of trade.

This action was brought in June 1979. Said complaint was dismissed by Judge Joseph Tauro of the Massachusetts Federal District Court on the ground that the action was not timely. The US First Circuit Court of Appeals affirmed said Justices's decision even though it made the statement:

> "We hesitate to infer that Berkson knew of facts sufficient to support a claim in 1972".

A writ of Certiorari to the United States Supreme Court was denied. As a result of discovery in the above mentioned case, which discovery was finally allowed over dilatory objections, the petitioner obtained said documents from DelMonte on or about the month of May 1983. These DelMonte internal documents contained evidence indicating payments made by DelMonte totalling about $500,000 US Dollars over a 6-month period for the purpose of reversing the approval by the Guatemalan Government of the petitioner and the Presa group as the desired bidders (documented in the record of the lower Court).

One of the DelMonte numbered internal documents referred to a meeting held on February 19, 1971, in Judge Lynne's chambers, supra, during which Raymond Philipps and John Wilson, representing the United States Justice Department, had represented to the Court that the Guatemalan Government had approved only DelMonte and no other purchaser of the devestitute assets (documented in the record of the lower Court). The US Justice Department knew that the petitioner and his associate, Julian Presa, and their Pan Tropic Fruit Company was the group to be negotiated with before any other as stated by the Guatemalan Government.

The basis evidencing the US Justice Department's knowledge of the petitioner and his associate's approval and selections by the Guatemalan Government was a memorandum by John Wilson to his file in the Justice Department dated January 20, 1971, stating that:

> "On January 15, James McGlothin, counsel for United, telephoned to report that a Guatemalan Government commission studying the request for permission to transfer the United properties to DelMonte has issued a report. The report, according to Mr. McGlothin recommends that the transaction not be approved until United first has negotiated with a group (Presa) of potential purchasers headed by the petitioner and Harry Kaplan which includes Guatemalan citizens."
> (documented in the record of the lower Court).

Therefore, based on said Justice Department official documents, the petitioner contends that although the overseers of the United Fruit consent decree, namely; John Wilson and Raymond Philipps unquestionably knew on January 20, 1971, that the Guatemalan Government preferred the petitioner's company, PanTropic, as the purchaser of the divestiture, they deliberately on February 19, 1971, one month later, falsely represented to Judge Lynne, the fashioner and monitor of said decree that the Guatemalan Government preferred DelMonte and DelMonte only as the purchaser.

These Government officials, Wilson and Philipps, perpetrated a massive fraud on the consent decree and the Federal Court itself.

Upon the dismissal of the petitioner's action against United Fruit & Brands and Del Monte, supra, and as a result of the internal documents obtained in May 1983, supra, the petitioner brought an action under the RICO Statute. Berkson v. DelMonte, et al, Civil Action No. 79-1180T (D. Mass. August 5, 1983), aff'd 743 F.2d 53 (1st Cir. 1984), cert. denied, ____ US ____, 105 Ct. 1765 (1985).

The said RICO action was commenced on September 26, 1986, against the DelMonte Corporation, United Fruit and Brands, their attorneys, their accountants, Price Waterhouse and several Government officials in the State Department claiming that they conspired to violate and did violate the consent decree in 1972 and, inter alia committed acts of bribery, perjury, mail wire, immigration and banking fraud, and obstruction of justice, which acts permitted and continue to permit

United Fruit and Brands and DelMonte to enjoy a shared monopoly in the banana market to the detriment of the American buying public and in a continuing violation of the United Fruit consent decree of 1958. Consent decree in United States v. United Fruit Co., Civil No. 4560 (E.D. La 1958). 18 USC 371, 18 USC 201, 18 USC 1961 (c), 18 USC 1341, 1343, 18 USC 1503, 18 USC 1621, 1622, 1623, 18 USC 1005.

The Massachusetts District Court dismissed said RICO action claiming that the petitioner1 did not bring the action within the statute of limitations of four years under RICO, Supreme Court in Agency Holding Corp. v. Malley-Duff & Associates, Inc., 107 S. Ct., 2759 (1987). The District Court, in dismissing, claimed that the petitioner did not bring the action within the statute of limitations parameters under the RICO Statute, giving as a reason that the petitioner had information in 1975 as a result of the Wall Street Journal article of July 14, 1975 which exposed DelMonte's bribery in Guatemala

(documented in the record of the lower Court). Said Journal article revealed that DelMonte made these payoffs in order to influence the then Guatemalan government to also approve DelMonte as the purchaser of the divestiture assets.

The petitioner appealed said dismissal to the US First Circuit Court of Appeals, which Court issued a written decision on June 29, 1988. This decision is part of the Appendix to this appeal. The First Circuit Court found, inter alia, that defendants and their attorneys had perjured themselves, (see First Circuit decision on pages 4 and 5). However, the First Circuit upheld the dismissal even though under the RICO Statute the defendants continued each and every day to violate the consent decree, continue to act in a non-rival manner while enjoying the fruits of their fraud and that of the Justice Department upon the US Federal Court in the Eastern District of Louisiana and even though the documentary evidence compels that United

Fruit and Brands and DelMonte are Central Intelligence Agency's (CIA) proprietary operatives in Guatemala and other countries of Central America.

The First Circuit Court also ordered that its decision not be published presumably to cover up the perjury of several major law firms and of corporate counsel of Del Monte.

The petitioner appealed said decision to the full Appellate Court bench which denied said appeal without opinion.

In a strange reversal of a normal procedural behavioural pattern of the First Circuit, the chief Judge Levin Campbell allowed to be made part of the record of this case a newspaper article which it would normally refuse to allow because it was not part of the record of the District Court below. Obviously, the Judge thought that the information contained in the newspaper article, authored by the noted and distinguished historian/writer, Thomas Boylston Adams,and

appearing in the Boston Globe on August 13, 1988, sufficiently important to have it made part of the record for the Supreme Court to review as to its historic content and how the credible information therein will affect the final resolution of this case. The article in part states:

> "In a secret briefing at the White House in July 1954...a group of Central Intelligence Agency operatives told how they had overthrown the Government of Guatemala and replaced it with another of their own choosing...When President Eisenhower turned to spymaster, Allen Dulles and congratulated him on the achievement, a chain of events was set in motion of extraordinary impact that which continues today. It would ruin the reputation of one of the witnesses of the show, Richard Nixon. I would nearly wreck the administration of John Kennedy, and bring the world, with the Cuban missile crisis, closer to Armageddon than ever before. It would destroy the credibility of the Reagan administration with the Iranian scandal...All Eisenhower said was "Congratulations, you've averted a Soviet beachhead in our hemisphere...These words effectively released the CIA from future interference by other government agencies."

The petitioner has steadfastly maintained throughout the proceedings in the RICO action and the prior antitrust case that he has been victimized by the unlawful, clandestine and secretive policies of the United States Government in concert with its agents and surrogates, namely, the defendants, Del Monte and United, acting as proprietaries and intelligence ocvers for the CIA.

Did the First Circuit Court of Appeals, in allowing this Adams' article to become part of the Court record send a signal to the Supreme Court that it, the First Circuit considers the historically acknowledged information in said article worthy of consideration as it pertains to the petitioner and his case?

In Mitchell v. Forsyth, S. Ct. (No. 84-335) in which the Supreme Court denied the Attorney General and other top Federal officials absolute immunity from suit for violating an individual's legal or constitutional rights in the name of national security. In this holding by the Supreme

Court Justice Byron White commented:

> ..."The danger that high Federal officials will disregard Constitutional rights in their zeal to protect the national security is sufficiently real to counsel against affording such officials an absolute immunity...An attorney General 'May on occasion have to pause' to consider the Constitutionality of certain actions... we do not believe that the security of the Republic will be threatened if its Attorney General is given incentives to abide by clearly established law."

The petitioner suspects that much of his grief stems from a clandestine presidential exemption to the "Foreign Corrupt Practices Act of 1977" under which certain select companies that serve as intelligence covers for the Central Intelligence Agency (CIA) if requested by the Director of said Agency (formerly Wm. Casey) and the Attorney General (formerly Edwin Meese) are exempt from upholding the law. The petitioner believes that the defendant companies in this matter, DelMonte and United Fruit have been given special exemption from filing accurate records with the Securities and Exchange

Commission (SEC) even though said exemption is in conflict with the requirements of accurate financial reporting to the SEC as demanded under the Securities Acts of 1933 and 1934 for the protection of shareholders in publicly held corporations. The defendant, Price Waterhouse, in this action also enjoys unconstitutional privileges to the detriment of the shareholders in DelMonte and United in addition to other corporations that it supposedly serves as a fiduciary agent while acting as a surrogate for the CIA in its clandestine covert operations.

The petitioner, herein, challenges the constitutionality of this presidential exemption to the "Foreign Corrupt Practices Act" becuase it is in Constitutional conflict with the Federal securities laws and is a disservice to the investing public.

## STATEMENT OF FACTS

The only basis upon which DelMonte became the purchaser of United Fruit & Brands'

divestiture assets were the false and fraudulent statements made by the Justice Department through its attorneys, Raymond Philipps and John Wilson, to Judge Lynne in 1971.

Said evidence proving said fraud was discovered on or after May 1983.

But for said fraud and other acts of the Justice Department, such as bribery, perjury and fraud which said department was involved with the defendants of said action, the petitioner and its associates in the Presa group would have been the purchasers of said divestiture assets.

The petitioner and his associate, the Guatemalan national, Julian Presa, had obtained the approval of the Guatemalan government to purchase the Guatemalan divestiture properties and which approval simultaneously denied DelMonte the right to purchase said properties (documents in the record of the Court below).

The petitioner additionally had obtained the necessary financing to purchase

the assets in the amount of $23,000,000 Million Dollars (documented in the record).

United Fruit & Brands' approval of Del Monte as a purchaser rather than the petitioner and his associates is evidenced by its assent to the albeit false representation made by the attorneys of the United States Justice Department all of which were done to obtain Judge Lynne's approval of the sale of DelMonte.

The law firms representing said DelMonte and United Fruit, in some instances submitted perjured affidavits (documented in the record below). Their defenses and actions were knowingly unfounded and manipulated with intent to delay the petitioner.

They also knew or should have known that said baseless defenses and dilatory actions were violations of the Canons of Ethics. In addition, they knew or should have known that the Justice Department, together with their clients, through bribery and/or improper influence and/or misrepresentations interferred in the petitioner and his associate's

advantageous business relationship with the Guatemalan government.

Former Secretary of State at the time, William Rogers and the American ambassador to Guatemala, Nathaniel Davis, maneuvered behind the scenes to surreptitiously and unlawfully acquire the divestiture assets for Del Monte. In so doing, Rogers and Davis violated the Requirement of Neutrality required of all Federal officials while aiding and abetting a fraud on the United Fruit consent decree of 1958. Former Secretary of State Henry Kissinger successfully engineered the "quashing" of the criminal investigation of Del Monte's payoffs in Guatemala in 1975 (documented in the record below).

Covington & Burling, a defendant in this action, and one of the law firms representing United admitted in the Twelfth Defense of its Answers on November 3, 1986, that

> "This defendant...is immune from suit to the extent that it took action in concert with officials of the United States Government who were acting pursuant to their

official duties.."

This statement by Covington proves conclusively that it is in stark violation of the"Anti-Deficiency Act" (US Code 1982, Title 31) which makes it a crime for any private party to work, in the name of the United States Government without Congressional approval.

ARGUMENT I

The statute of limitations does not apply in the instant case where private persons and/or entitites act as agents of the Federal Government without proper authorization by Congress as propounded in the "Anti-Deficiency Act" and knowingly deprive a citizen of his property rights, namely; the petitioner's right to purchase the United Fruit divestiture properties in Guatemala.

The United States Justice Department exceeded its power in using its authority in antitrust matters to force out the petitioner and his Guatemalan associates, Presa and Fanjul,

from purchasing United Fruit's divestiture assets. The documentary evidence categorically shows that the Justice Department knowingly misrepresented to the Court (Judge Lynne) that DelMonte was the only purchaser approved by the Guatemalan government. The only reasonable inference for said fraud was to maintain and perpetuate a front for the covert operations of the Central Intelligence Agency (CIA) operations in Guatemala that United Fruit had heretofore provided on the same properties.

Although information gathering and security of same is and should be permitted, it cannot be done at the expense of an individual's advantageous business relationship and/or his property rights.

The Government is bound to uphold the Constitution and the rights protected thereunder. It's diliberate, although covert, taking of the petitioner and his associates' property rights in the name of security and/or public good is violative of the due

process clause of the Constitution.

The petitioner alleges and has evidence sufficient to raise an issue of fact that the private entities and/or persons involved were so involved as agents and surrogates of the Government and its objectives.

The law is that the statute of limitations is not applicable where the Government illegally deprives and/or takes the property of an individual without just compensation. In City of New York v. Margaret Heckler (Docket No. 84-6037- No. 1095 - August Term 1983)(2nd Circuit) which case pronounced principles of law concerning the tolling of the Statute of Limitations applicable to the facts in this case. The Court ruled:

> "All of the class members who permitted their administative or judicial remedies to expire were entitled to believe that their Government's determination of eligibility was the considered judgment of an agency faithfully executing the laws of the United States...where the Government's secretive conduct prevents plaintiffs from knowing of a violation

> of rights, statutes of limitations have been tolled until such time as plaintiffs had a reasonable opportunity to learn the facts concerning the cause of action...since in this case the full extent of the Government's clandestine policy was uncovered in the course of this litigation. All class members may pursue this action notwithstanding the 60-day requirement."

In the instant case, only after the commencement of the prior antitrust action in 1979 did the petitioner learn that the Government agencies involved were not "faithfully executing the laws of the United States" and did not learn that the said Government agencies' secretive conduct prevented him from knowing of the violations of his rights. As a result of such actions, the statute of limitations should be tolled until the petitioner learned of the facts concerning said Government agencies' unfaithful and secretive actions. The Government and its agents and surrogates should not be able to profit from their own fraud by using the statute of limitations to bar the petitioner's

claims.

Agents or surrogates of the Government's said action cannot disclaim their para-governmental activities, which is also prohibited by the Anti-Deficiency Act, by a claim that the statute of limitations is applicable to affairs between private individuals is controlling. Said private individuals and/or entities who act as governmental surrogates are accountable to the same degree and extent that the Government is on the matter of the statute of limitations.

To hold otherwise, would amount to sponsoring and/or inducing the Government to violate the Anti-Deficiency Act in order to limit the time that the injured party has to bring action.

The petitioner had the inordinate and super human task to uncover facts buried by the Government in order to prove his case against these defendants.

Public policy dictates that statutes of limitation relevant to the ordinary

business affairs of men is not and should not be controlling, especially where the architect and moving force depriving a citizen of his property rights is the Government.

To hold otherwise gives rise to images of Constitutional deprivations of such enormity that would render the Constitution a mere slip of paper.

Alternatively, the measure should be one of reasonableness. The petitioner working pro-se and not being a lawyer and unable to obtain a lawyer willing to take on the Government and perhaps the Judiciary, brought his actions within a reasonable time frame.

In Agency Holding, 107 S. Ct. 2759 (1987) the Supreme Court of the United States held that the four-year statute of limitations governing Clayton Act civil enforcement actions, 15 USC, Section 15(b) constituted the applicable limitations period for civil RICO actions.

Although the US First Circuit of Appeals ruled that the petitioner should have brought

this instant RICO action prior to September 1982, instead of September 1986, the petitioner believes that the First Circuit erred monumentally.

It was only after receiving DelMonte's internal documents, produced under court order in the early part of 1983, that the petitioner's suspicions of the defendants' wrongful acts became actual knowledge. The petitioner did not have the crucial knowledge that was discovered in said documents prior to 1983.

It would have been foolhardy and imprudent on the petitioner's part to have brought suit on the meagre suspicions he had prior to 1983. The petitioner's original suspicions were buttressed and bolstered by the revelations contained in DelMonte's documents produced in 1983. The petitioner, therefore, maintains that a fair-minded and impartial jury would agree with him that he did not know of facts sufficient to have supported a claim prior to the 1983-1987 parameters of limitations. The petitioner steadfastly claims

that when he filed suit in September 1986, he was safely within the parameters of the statute of limitations, namely; the period between 1983 and 1987.

The involvement of the Government behind the scenes muddied the mosaic, the jigsaw of facts that the petitioner had to contend with before he could bring the whole overall conspiracy into sharp focus. The revelations of the wrongful acts perpetrated by all the defendants in this matter did not happen in one fell swoop. It took time and painstaking effort on the petitioner's part to link all the factors together which would eventually produce the clear picture of this conspiracy.

The petitioner's mistake was not including the Government as a party defendant. However, for all the reasons stated above, this case poses an issue which must be addressed by the Court. That issue being that the Court must allow this action in order for petitioner to prove that the fraud per-

pertrated on the Federal Court was part and parcel of denying the petitioner his property rights by surrogates of the Government without due process.

ARGUMENT II

The pattern of racketeering activity indicating a violation under the RICO statute continues to be operating and having as its base the original sin, to wit: the false and fraudulent apple that the Justice Department offered Judge Lynne of the Louisiana Court.

The defendants, DelMonte and United Fruits and Brands, continue to enjoy a shared monopoly in the American banana market under the aegis of the Central Intelligence Agency (CIA) and the US Justice and State Departments.

Said companies and their respective law firms have admitted to being agents and surrogates of said Government agencies in violation of the Anti-Deficiency Act as well as being in contempt of the United Fruit con-

sent decree of 1958.

The petitioner discovered the Government's fraud in 1983 when he obtained Del Monte's internal documents revealing this information.

The petitioner brought his RICO action in September 1986, well within the time parameters of the statute of limitations of four years, namely; 1983/1987.

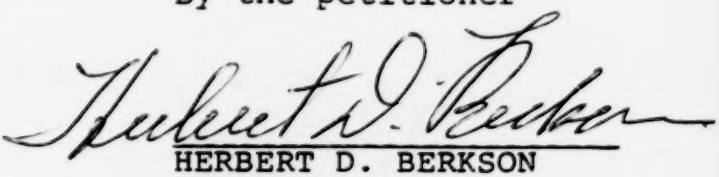
Additionally, civil RICO was not firmly established until the Supreme Court decided it in its 1985 decision, Sedima, S.P.R.L. v. Imrex Company, 105 S. Ct. 3275, 3285 (1985). Furthermore, one of the leading commentators on RICO, Professor G. Robert Blakey, former chief counsel to the Senate sub-committee which proposed RICO, has stated "that prior to 1983, civil RICO was essentially uncharted territory and that because of the chaotic state of the law prior to 1983 that jurisprudence (under civil RICO) could hardly be said to have been authoritively determined before Bennett. Bennett v. Berg, 685 F.2(d) 1053 (8th Cir. 1983)

## CONCLUSION

The petitioner hereby requests that a writ of certiorari be issued to the panel of judges of the United States Court of Appeals for the First Circuit who rendered the decision on this case, directing them to certify to this Honorable Court a true, complete and perfect record of all the proceedings before them in the appeal of Berkson v. DelMonte, et al, No. 87-1539 in said files of said Appeals Court, together with all pleadings and papers. To the end that any errors of law may be determined or corrected by this Court and to enable this Court to determine whether the finding and decision of the First Circuit Court of Appeals are warranted as a matter of law upon the evidence before it. Your petitioner further requests that the finding and decision of the panel of the United States Court of Appeals for the First Circuit may be quashed and reversed, and for such other

and further belief as law and the cause of justice may require.

By the petitioner



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Dated: November 25, 1988

(NOT FOR PUBLICATION)

UNITED STATES COURT OF APPEALS
For the First Circuit

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No. 87-1539

HERBERT D. BERKSON

Plaintiff, Appellant

v.

DEL MONTE CORPORATION, ET AL

Defendants/Appellees

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASS.

(Hon. David S. Nelson, US District Judge)

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Before

Campbell, Chief Judge

Coffin and Selya, Circuit Judges

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Herbert D. Berkson on brief pro se.
Craig E. Stewart, John T. Harding, and Palmer & Dodge for appellees, Palmer & Dodge and Pillsbury, Madison & Sutro
Thomas J. Griffin, Jr. and Goodwin, Procter & Hoar on brief for appellee, Procter & Hoar. Thomas J. Griffin, Jr., Richard A. Oetheimer, Gordon H. Piper and Goodwin, Procter & Hoar on brief for appellee, United Brands Company.

Christine M. Roach, Assistant US Attorney and Frank L. McNamara, Jr., Acting United States Attorney, on brief for appellees, Henry Kissinger, William P. Rogers and Nathaniel Davis
Jennifer A. Kemp, Jeffrey B. Rudman and Hale & Dorr on brief for appellee, Price Waterhouse.
Jack R. Pirozzolo, Richard L. Binder, Willcox, Pirozzolo & McCarthy Professional Corporation on brief for appellee, Covington & Burling.
Paul B. Galvani and Ropes & Gray on brief for appellee, Del Monte Corporation.

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June 29, 1988

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Per Curiam. The Judgment of the District court is affirmed substantially for the reasons stated in the magistrate's report and recommendation adopted by the district court.

The magistrate found that plaintiff, Herbert D. Berkson's claims under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 USC, Section 1961 et seq., against all defendants were timebarred (whereas principles of res judicata were found to preclude Berkson's claims against those defendants who were parties to plaintiff's prior federal suit, Berkson v. DelMonte Corp. 743 F. 2d (1st Cir. 1984), cert denied, 470 US 1056 (1985).

In so finding, the magistrate applied the three-year limitations period for Massachusetts tort actions contained in MGL, c. 260, Section 2A, as the statute of limitations governing plaintiff's RICO claims. Plaintiff's complaint having been filed on September 25, 1986, the magistrate found that

plaintiff's claims were barred if they accrued before September 25, 1983. Accordingly, plaintiff's claims based on defendants' alleged misdeeds in the course of plaintiff's prior federal actions were held time-barred because all these claims accrued before August 1983, when the district court entered judgment against plaintiff on the basis of the magistrate's report and recommendation. Plaintiff's other claims, based on the 1972 divestiture of United Brands were held time-barred because they arose no later than 1972 and because principles of collateral estoppel bound plaintiff to the determination in the prior federal action there had been no fraudulent concealment of these claims.

After the district court's judgment, the Supreme Court ruled in Agency Holding Corp. v. Malley-Duff & Associates, In., 107 S. Ct., (2759)(1987), that the four-year statute of limitations governing Clayton Act civil enforcement actions, 15 USC, Section 15b, constituted the applicable limitations period for

civil RICO actions. Thus, plaintiff's claims are time-barred if they accrued before September 25, 1982, not the September 25, 1983 date applied by the magistrate.

Obviously this adjustment does not affact plaintiff's claims based on the 1972 divestiture. Those claims remain long time-barred under the new standard.

Nor does application of the four-year limitations period revive, as timely, any of the plaintiff's RICO claims based on events in the prior federal action. A cause of action under RICO accrues when "a plaintiff knows or should know of the injury" which forms the basis of the plaintiff's action. Bowling v. Founders Title Co., 773 F. 2d 1175, 1178 (11th Cir. 1985), cert. denied, 475 US 1109 (1986).

Plaintiff's RICO claims against each defendant accrued when he was first injured by the defendant's alleged acts, not when the last predicate act for a RICO claim occurred. Id. The allegedly false affidavit of

Laurence Johnson submitted by Palmer and Dodge on DelMonte's behalf was filed on or about August 1, 1979, and the allegedly false interrogatories filed on DelMonte's behalf were filed on June 18, 1981. Furthermore, plaintiff asserts in his brief on appeal that by November 25, 1981, he noticed that the district judge in the prior federal action had turned against him as part of a conspiracy involving Palmer & Dodge, Goodwin, Procter & Hoar, and their clients. Accordingly, we hold that plaintiff's claims under RICO accrued before September 25, 1982, and are, therefore, time-barred even under Agency Holding Corp., supra, 107 S. Ct. 2759.

Plaintiff also purported to bring claims under the Securities Exchange Act of 1934, 15 USC, Section 78n(e). Claims brought under that section, which does not itself specifically provide for a limitation, are subject to the most closely analagous statute of limitations of the forum state, i.e., the

statute of limitations for common law fraud actions. Stull v. Bayard, 561 F. 2d 429, 431 (2nd Cir. 1977), cert. denied, 434 US 1035 (1978). See Cook v. Avien, Inc., 573 F. 2d 685, 694 (1st Cir. 1978); Janigan v. Taylor, 344 F. 2d 781, 783 (1st. Cir.), cert. denied 382 US 879 (1965).

In Massachusetts the limitations period for tort and fraud actions is three years, MGL, c. 260, Section 2A. Accordingly, any securities claim might assert is barred if it accrued before September 25, 1983. However, plaintiff's securities claims are based on his allegation that defendant, Price Waterhouse, wrongfully approved DelMonte's payment of $500,000---characterized by plaintiff as a bribe---to a foreign consultant in connection with the 1972 divestiture. Not only did this payment occur fourteen years before plaintiff filed his complaint, but plaintiff's complaint concedes that the "bribe" was reported in a 1975 article in the Wall Street Journal. Plaintiff's securities claims

under 15 USC, Section 78n are accordingly time-barred.

Insofar as plaintiff purports to bring a variety of common law tort claims (governed by the three-year statute of limitations of MGL c. 260, Section 2A) and claims under the Sherman and Clayton Acts (governed by the four-year statute of limitations of 15 USC, Section 15b), these claims are time-barred and/or precluded under principles of res judicata for reasons stated in the magistrate's report and recommendation and in this opinion.

Defendant/appellee, Covington & Burling's request for sanctions against plaintiff is denied.

The judgment of the district court is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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HERBERT D. BERKSON
Plaintiff, Appellant

v.

DEL MONTE CORPORATION, ET AL.,
Defendants, Appellees

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ORDER OF THE COURT

Entered August 23, 1988

Appellant's letter to Chief Judge Campbell dated August 15, 1988 is treated as a motion to supplement appellant's petition for rehearing in banc. Supplementation of the petition by said letter is hereby permitted.

By the Court

Clerk

(cc: Messrs. Berkson, Galvani, Pirozzolo, Stewart, Rudman, Griffin and Ms. Roach)

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

---

HERBERT D. BERKSON
Plaintiff, Appellant

v.

DEL MONTE CORPORATION, ET AL.,
Defendants, Appellees

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Before
Campbell, Chief Judge,
Coffin, Bowns, Breyer, Torruella and Selya
Circuit Judges

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ORDER OF COURT

Entered September 15, 1988

Appellant's petition for rehearing in banc denied

By the Court

Clerk

(cc: Messrs: Berkson, Pirozzolo, Stewart, Rudman, Galvani, Harding, Oethheimer, Griffin, Martin, Piper, Ms. Kemp and Ms. Roach)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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No. 86-2775-N

HERBERT D. BERKSON

v.

DEL MONTE CORPORATION, ET AL

---

JUDGMENT IN A CIVIL CASE

---

Decision by Court. The Court having accepted the recommendation of Magistrate IT IS ORDERED AND ADJUDGED

JUDGMENT FOR THE DEFENDANTS

Date May 29, 1987

George F. McGrath
Clerk

By: Deputy Clerk

Supreme Court, U.S.
FILED
FEB 3 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1019

# In the
# Supreme Court of the United States

OCTOBER TERM, 1988

HERBERT D. BERKSON,
PETITIONER,

*v.*

DEL MONTE CORPORATION, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

## Brief In Opposition of Respondents Palmer & Dodge and Pillsbury, Madison & Sutro

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February 3, 1989

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

## Question Presented

Whether all the courts below correctly held that either the statute of limitations, collateral estoppel, or both bar *pro se* petitioner's claims against respondents Palmer & Dodge and Pillsbury, Madison & Sutro.

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HERBERT D. BERKSON,
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DEL MONTE CORPORATION, ET AL.,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

## Brief In Opposition of Respondents Palmer & Dodge and Pillsbury, Madison & Sutro

Respondents Palmer & Dodge and Pillsbury, Madison & Sutro respectfully request that this Court deny the petition for writ of certiorari seeking review of the First Circuit Court of Appeal's decision in this case. In that unpublished decision, set forth at pages 1a-1h of petitioner's appendix, the Court of Appeals affirmed *per curiam* the entry of summary judgment against petitioner based on res judicata, collateral estoppel, and the statute of limitations.

## Parties and Opinions Below

The Brief and Appendix In Opposition of the Respondent, United Brands Company sets forth the parties and describes the opinions below. The appendix to that brief sets forth the magistrate's opinion approved by the District Court and affirmed by the Court of Appeals.

## Statement of the Case

This is the third "Bananagate" lawsuit petitioner Berkson has filed to contest the court-approved divestiture of certain United Brands Company properties in 1972. The United Brands brief in opposition sets forth the general history of this litigation.

In the lawsuit now before the Court petitioner sued United Brands Company, Del Monte Corporation, Henry Kissinger, and a host of other defendants, including the law firms of Palmer & Dodge and Pillsbury, Madison & Sutro. Petitioner claims a "Bananagate" conspiracy involving "rogue" elements of the CIA, "Mafia hit-men," and the "threat of assassination from the CIA itself." Brief for Appellant in the Court of Appeals at 10, 11, 22.

Respondents Palmer & Dodge and Pillsbury, Madison & Sutro moved to dismiss or for summary judgment. Petitioner filed no admissible evidence with his opposition to this motion. He submitted instead newspaper clippings (*e.g.* "CIA disguises for Col. Oliver North," "Iran arms deal: the aftermath"), hand-lettered annotations, and various other unauthenticated materials. C.A. App. 254-83.[1]

[1] References to "C.A. App. —" are to the 2,269-page appendix filed with the Court of Appeals.

The United States Magistrate hearing the case recommended that Palmer & Dodge, and Pillsbury, Madison & Sutro, along with every other defendant, be granted summary judgment. He found that collateral estoppel barred the claims that were based on the 1972 divestiture, a subject of earlier Berkson litigation. C.A. App. 350-52. The magistrate further found that the statute of limitations barred petitioner's claim under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961, against Palmer & Dodge for its defense of Del Monte in Berkson's earlier federal lawsuit. C.A. App. 353-54. The District Court adopted the magistrate's recommended rulings, and the Court of Appeals then affirmed.

## Reasons for Denying the Writ

Petitioner presents no issue worthy of this Court's attention. He does not now challenge the collateral estoppel ruling below. That uncontested ruling disposes of all his claims against the respondent law firms based on the 1972 divestiture.

The statute of limitations bars petitioner's remaining claim against Palmer & Dodge for its defense against petitioner's earlier litigation. The Brief In Opposition of the Respondent, Goodwin, Procter & Hoar — another law firm sued for its defense against petitioner Berkson's prior federal lawsuit — disposes of petitioner's statute of limitations arguments. That brief is hereby adopted and incorporated by reference.

## Conclusion

The petition for certiorari should be denied.

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February 3, 1989

[2] Counsel of Record. Counsel note that petitioner has filed a "Motion That The Appearance of Robert W. Meserve For Del Monte Corporation Should Be Stricken . . . . " In fact, Mr. Meserve has not entered his appearance for Del Monte in this proceeding. He is counsel of record for respondents Palmer & Dodge and Pillsbury, Madison & Sutro.

(3)

Supreme Court, U.S.
FILED
FEB 21 1989
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CLERK

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*v.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

## Brief In Opposition of the Respondent, Goodwin, Procter & Hoar

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## Question Presented for Review.

Whether the courts below were correct in unanimously deciding on the facts that the petitioner's claims against Goodwin, Procter & Hoar were time-barred.

## Parties.

The parties to this action are: (1) Herbert D. Berkson ("Berkson" or "petitioner"), the petitioner in this Court, the plaintiff in the District Court, and the appellant in the United States Court of Appeals for the First Circuit; and (2) Goodwin, Procter & Hoar ("Goodwin Procter"), a respondent in this Court, a defendant in the District Court, and an appellee in the First Circuit.

There are nine additional respondents in this action, all of whom were also defendants in the District Court and appellees in the First Circuit: (1) Covington & Burling; (2) Nathaniel Davis; (3) Del Monte Corporation ("Del Monte"); (4) Henry A. Kissinger; (5) Palmer & Dodge; (6) Pillsbury, Madison & Sutro; (7) Price Waterhouse; (8) United Brands Company ("United Brands"); and (9) William A. Rogers.

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No. 88-1019

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*v.*

DEL MONTE CORPORATION, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

## Brief In Opposition of the Respondent, Goodwin, Procter & Hoar

### Opinions Below.

The opinion of the United States Court of Appeals for the First Circuit, *Herbert D. Berkson* v. *Del Monte Corporation*,

*et al.*, No. 87-1539, dated June 29, 1988, is not published. It is reprinted in the Petitioner's Appendix (Pet. App. at 1a).[1]

The Order of the United States District Court for the District of Massachusetts accepting and adopting the Magistrate's Report and Recommendation on Defendants' Motions to Dismiss or, In the Alternative, Motions For Summary Judgment (the "Magistrate's Report"), and thereby entering judgment for Goodwin Procter, was dated May 29, 1987 (Pet. App. at 1k).

The Magistrate's Report which was accepted and adopted by the District Court was dated April 23, 1987 (Resp. App. at 1a).

## Statement of the Case.

Respondent Goodwin Procter incorporates by reference the Statement of the Case contained in the Brief and Appendix In Opposition of the Respondent, United Brands Company, filed contemporaneously herewith. Respondent Goodwin Procter supplements the referenced Statement of the Case as follows:

Goodwin Procter is a Boston law firm established in 1912. Goodwin Procter has represented United Brands Company in the three lawsuits which petitioner has commenced against United Brands since 1974. Goodwin Procter did not, however, have any involvement in the transactions and occurrences which gave rise to petitioner's three lawsuits. Goodwin Procter did not, for instance, represent United Fruit, now known as United Brands, in connection with either the 1958 Consent Decree or the 1972 divestiture sale of United Fruit's Guatemala banana lands to Del Monte.

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[1] Citations to Petitioner's Appendix are in the form "(Pet. App. at ___)." Citations to Respondent United Brands' Appendix, which is printed and bound with the Brief In Opposition of Respondent, United Brands Company, are in the form "(Resp. App. at ___)."

During petitioner's state court action (hereinafter "*Berkson I*") against United Brands as well as petitioner's previous federal court action (hereinafter "*Berkson II*"), Goodwin Procter served as counsel for United Brands. It is only in this most recent case that petitioner has named Goodwin Procter as a defendant. Petitioner has also in this case named as a defendant Palmer & Dodge, the law firm which represented Del Monte in *Berkson II*.[2] Petitioner's only claims against Goodwin Procter concern allegations of misconduct in connection with the defense of United Brands in *Berkson II*.

In the current case, petitioner brought claims against Goodwin Procter under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 *et seq.*[3] The courts below dismissed petitioner's claims against Goodwin Procter under the statute of limitations.

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[2] In the current action, petitioner has also named as defendants the law firms — Covington & Burling and Pillsbury, Madison & Sutro — which respectively represented United Fruit and Del Monte during the transactions and negotiations leading up to the 1972 divestiture sale. In addition, petitioner's current suit is against the accounting firm of Price Waterhouse and three former high ranking government officials — Nathaniel Davis, Henry A. Kissinger and William Rogers.

[3] Petitioner also raises for the first time in the current Petition arguments under the Anti-Deficiency Act, 31 U.S.C. §§ 1341 *et seq*. These arguments are meritless. In further response to petitioner's irrelevant Anti-Deficiency Act contentions, Goodwin Procter incorporates herein by reference the arguments contained in the Brief and Appendix of the Respondent, United Brands Company and in the Brief of Respondent Covington & Burling in Opposition to Petition for Writ of Certiorari.

## Reasons for Denying the Writ.

### I. The Courts Below Correctly Held That Berkson's RICO Claims Against Goodwin, Procter & Hoar Were Time-Barred.

The statute of limitations for civil RICO actions is four years. *Agency Holding Corp.* v. *Malley-Duff & Associates, Inc.*, 483 U.S. 143 (1987).[4] Petitioner commenced this action on September 25, 1986. Therefore, unless petitioner's RICO claims accrued after September 25, 1982, they are time-barred.

The courts below found that petitioner knew or should have known of his alleged RICO injury arising out of *Berkson II* well *before* September 25, 1982. The Court of Appeals noted petitioner's assertion that by November 25, 1981, "he noticed that the district judge in the prior federal action [*Berkson II*] had turned against him as part of a conspiracy involving Palmer and Dodge, Goodwin, Procter, and Hoar, and their clients," (Pet. App. at 1f). The First Circuit held that petitioner's RICO claims against Palmer & Dodge and Goodwin, Procter & Hoar accrued no later than this November 25, 1981 date; and were, thus, time-barred when petitioner commenced this action on September 25, 1986.

Petitioner has not shown that any defendant committed a single specific act after September 25, 1982, which could

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[4] This Court's decision in *Agency Holding Corp.* was handed down after the District Court entered judgment against petitioner but before the First Circuit decided petitioner's appeal. The District Court, following the Magistrate's Report and Recommendation (*see* Resp. App. at 1a), had applied a three year limitations period to petitioner's RICO claims. The First Circuit examined the record facts in light of the four-year period mandated by *Agency Holding Corp.* and specifically found that the additional year made no difference. It held that petitioner's "claims under RICO . . . are . . . time-barred even under *Agency Holding Corp.*" (Pet. App. at 1f.)

conceivably qualify as a predicate for civil RICO liability.[5] Nowhere in his Complaint, nor in his opposition to defendants' summary judgment submissions before the District Court, nor in his briefs to the First Circuit, nor in his current Petition for Certiorari has Berkson identified, let alone shown by admissible evidence, the existence of a RICO predicate act performed by Goodwin Procter or any other defendant after September 25, 1982.

No matter how the starting point for the civil RICO limitations period is measured — whether from the date of defendant's first alleged RICO predicate act or the date of plaintiff's alleged knowledge of defendant's last alleged RICO predicate act — petitioner's RICO claims against Goodwin Procter are time-barred. When Goodwin Procter and the other respondents moved for summary judgment before the District Court, the burden plainly became petitioner's to "designate 'specific facts showing that there is a genuine issue for trial.' " *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 324 (1986) (quoting Fed. R. Civ. P. 56(e)). Petitioner wholly failed to meet this burden. He has simply failed to show that there is a genuine issue as to the existence of any material fact that would support the proposition that his alleged RICO claims accrued after September 25, 1982. Accordingly, the First Circuit was correct to hold that petitioner's RICO claims based on events in his prior federal action are time-barred.

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[5] The current Petition refers to a May 1983 document production made during *Berkson II* by Palmer & Dodge on behalf of Del Monte. Petitioner merely asserts that the document production provided him with proof of his previous suspicions. Petitioner does not maintain that prior to May 1983 he was ignorant of his alleged injury or that he was unaware of the various defendants' having allegedly caused his injury. Under such circumstances, it is not the rule that a statute of limitations is tolled until such time as a plaintiff's suspicions ripen during discovery. *See generally United States* v. *Kubrick*, 444 U.S. 111, 122-125 (1979). *See also United States* v. *Mottaz*, 476 U.S. 834, 843-844 (1986); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 339 (1971). In any event, the May 1983 document production is irrelevant to petitioner's claims against Goodwin Procter.

Notwithstanding his complete inability to designate a single post-September 25, 1982 RICO predicate act, in his current Petition Berkson has pointed to this Court's 1985 decision in *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479 (1985), as a reason why his RICO claims should not have been time-barred. Petitioner argues that the RICO limitations period should not have started running until this Court's 1985 decision in *Sedima*, because until then he could not have been certain of his rights under RICO. However, even though *Sedima* may have clarified the parameters of civil RICO, the decision is not relevant to when the statute of limitations began to run. *See, e.g., Kubrick*, 444 U.S. at 122-125; *Jensen* v. *Snellings*, 841 F.2d 600, 606 (5th Cir. 1988) ("The requisite knowledge that a plaintiff must have to begin the running of the limitations period 'is merely that of the *facts* forming the *basis* of his cause of action,' . . . not that of the existence of the cause of action itself") (emphasis in original) (citations omitted).

Petitioner also suggests that the continuing adverse effects which he allegedly experiences from the 1972 divestiture sale somehow give rise to actionable claims under RICO. This suggestion is obviously irrelevant to petitioner's claims against Goodwin Procter, which was not in any way involved in the 1972 transaction. Moreover, even as against the other defendants, the suggestion is without a scintilla of precedential support. The continuing harm allegedly experienced by Berkson "must be seen as the 'unabated inertial consequence[ ]' of the earlier events," *Berkson* v. *Del Monte Corp.*, 743 F.2d 53, 55 (1st Cir. 1984), *cert. denied*, 470 U.S. 1056 (1985) (citation omitted), and not as the basis for a claim under RICO.

## II. This Court Should Not Engage in Further Fact Finding Concerning the Timeliness of Petitioner's Claims.

As indicated above, petitioner has plainly failed to meet his burden of designating a single specific act occurring after September 25, 1982 which could serve as a predicate for civil RICO liability. *Celotex*, 477 U.S. at 324. The two courts below carefully combed the voluminous record and concluded without equivocation that all of Berkson's claims against Goodwin, Procter & Hoar were time-barred under applicable statutes of limitations. The Court of Appeals specifically found that Berkson's civil RICO claims were barred under the four-year limitation period established by *Agency Holding Corp.* There is no need for this Court to engage in any further fact-finding. As this Court has stated, "we do not grant certiorari to review evidence and discuss specific facts," *United States v. Johnston*, 268 U.S. 220, 227 (1925). *See also Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949).

## Conclusion.

For all of the reasons set forth above, as well as for the reasons set forth in the Brief In Opposition filed by respondent United Brands Company, Berkson's Petition for Certiorari should be denied.

Respectfully submitted,

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DATED: February 6, 1989

(4)

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

## Brief and Appendix In Opposition of the Respondent, United Brands Company

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## Question Presented for Review.

Whether the courts below were correct in unanimously deciding that *res judicata* barred petitioner's suit against United Brands based on the final judgment in petitioner's prior federal action, *Berkson* v. *Del Monte Corp.*, 743 F.2d 53 (1st Cir. 1984), *cert. denied*, 470 U.S. 1056 (1985).

## Parties.

The parties to this action are: (1) Herbert D. Berkson ("Berkson" or "petitioner"), the petitioner in this Court, the plaintiff in the District Court, and the appellant in the United States Court of Appeals for the First Circuit; and (2) United Brands Company ("United Brands"), a respondent in this Court, a defendant in the District Court, and an appellee in the First Circuit.[1]

There are nine additional respondents in this action, all of whom were also defendants in the District Court and appellees in the First Circuit: (1) Covington & Burling; (2) Nathaniel Davis; (3) Del Monte Corporation ("Del Monte"); (4) Goodwin, Procter & Hoar; (5) Henry A. Kissinger; (6) Palmer & Dodge; (7) Pillsbury, Madison & Sutro; (8) Price Waterhouse; and (9) William A. Rogers.

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[1] Pursuant to Rule 28.1, the parent companies, subsidiaries (except wholly-onwed subsidiaries) and affiliates of United Brands are GACC Holding Company, American Financial Corporation, Great American Communications Company, Great American Holding Corporation, F.I.I. — Fyffes PLC. and Pascual Hermanos, S.A.

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## Brief and Appendix In Opposition of the Respondent, United Brands Company

### Opinions Below.

The opinion of the United States Court of Appeals for the First Circuit, *Herbert D. Berkson* v. *Del Monte Corporation,*

*et al.*, No. 87-1539, dated June 29, 1988, is not published. It is reprinted in Petitioner's Appendix (Pet. App. at 1a).[2]

The Order of the United States District Court for the District of Massachusetts accepting and adopting the Magistrate's Report and Recommendation on Defendants' Motions to Dismiss or, In the Alternative, Motions For Summary Judgment, and thereby entering judgment for United Brands, was dated May 29, 1987 (Pet. App. at 1k).

The Magistrate's Report which was accepted and adopted by the District Court was dated April 23, 1987 (Resp. App. at 1a).

## Statement of the Case.

This is the third lawsuit which petitioner has brought against United Brands arising out of the 1972 sale of United Brands' Guatemala banana properties to respondent Del Monte. Since November 3, 1974, when petitioner first filed an action in Massachusetts State Court against United Fruit, now known as United Brands, a Massachusetts Trial Court, a Massachusetts Appeals Court, two Federal magistrates, two Federal District Court judges, two separate panels of the Court of Appeals for the First Circuit, and this Court, have all considered and rejected petitioner's claims against United Brands.

Petitioner commenced the current action on September 25, 1986, seeking injunctive relief and $1 billion in damages. Petitioner's Complaint is primarily based on the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 *et seq.* but also contains passing references

[2] Citations to Petitioner's Appendix are in the form "(Pet. App. at ). " Citations to Respondent United Brands' Appendix printed and bound with this brief are in the form "(Resp. App. at )."

to other statutes and legal theories. The RICO label petitioner now attaches to his claims is new; however, petitioner's factual allegations against United Brands are precisely the same as those he made in his two previous lawsuits.

### A. United Brands' Motion to Dismiss or for Summary Judgment.

On November 3, 1986, United Brands moved to dismiss the current action or for summary judgment. United Brands maintained that petitioner's claims were barred by the final judgment in United Brands' favor in *Berkson* v. *Del Monte Corporation and United Brands Company*, No. 79-1180-T (D. Mass., August 5, 1983), *aff'd*, 743 F.2d 53 (1st Cir. 1984), *cert. denied*, 470 U.S. 1056 (1985). The other defendants, likewise, all moved to dismiss or for summary judgment. In support of these motions, defendants advanced grounds including *res judicata*, collateral estoppel, the statute of limitations, and failure to state a claim upon which relief can be granted.

On April 23, 1987, the Magistrate issued his Memorandum and Recommendation on Defendants Motions to Dismiss or, In the Alternative, Motions for Summary Judgment (the "Magistrate's Report") (Resp. App. at 1a). The Magistrate recommended that summary judgment be granted: (1) to defendants United Brands and Del Monte on grounds of *res judicata*; (2) to defendants William Rogers, Henry Kissinger, Price Waterhouse, Pillsbury, Madison & Sutro, Covington & Burling, and Nathaniel Davis, on grounds of collateral estoppel and the statute of limitations; and (3) to defendants Goodwin, Procter & Hoar and Palmer & Dodge, on the basis of the statute of limitations.

On May 29, 1987, the District Court, having accepted and adopted the Magistrate's recommendations, entered judgment

for all defendants (Pet. App. at 1k). On June 29, 1988, the Court of Appeals for the First Circuit affirmed the judgment of the District Court, "substantially for the reasons stated in the Magistrate's Report and Recommendation adopted by the District Court." *Berkson* v. *Del Monte Corporation, et al.*, No. 87-1539, slip op. at 3 (Pet. App. at 1c). On September 15, 1988, the Court of Appeals denied Berkson's petition for rehearing *en banc* (Pet. App. at 1j).

## B. Events Leading to the 1972 United Brands Sale of the Guatemala Property to Del Monte.

The events which produced the last 15 years of litigation between Berkson and United Brands may be traced back to 1954. The history is set out in the Magistrate's Report (Resp. App. at 2a-4a) and in the reported decision of the First Circuit Court of Appeals dismissing Berkson's prior federal action. *Berkson* v. *Del Monte Corp.*, 743 F.2d 53 (1st Cir. 1984), *cert. denied*, 470 U.S. 1056 (1985).

On July 2, 1954, the United States commenced an action in the United States District Court for the Eastern District of Louisiana against United Fruit, for alleged violations of the Sherman Act. In 1958, a Consent Decree was entered into by the parties. Article VIII of the Consent Decree required United Fruit to divest itself of a part of its banana producing properties in Latin America.

In 1970, certain United Fruit properties in Guatemala were approved for sale by the Louisiana Federal District Court as a means of fulfilling Article VIII of the Consent Decree. Bids were solicited. Del Monte bid for the properties, and United Fruit accepted Del Monte's bid.

In 1972, the Government of Guatemala approved the purchase. The United States Department of Justice also approved

the sale. After a hearing before the federal district court in Lousiana, the sale gained final court approval. Title to the Guatemalan properties passed from United Fruit to Del Monte on December 14, 1972. With the passage of title, United Fruit fulfilled its divestiture obligations under the 1958 Decree.

Petitioner appeared at the 1972 Federal District Court hearing and registered his opposition to the United Brands - Del Monte transaction. Petitioner addressed the court in oral argument and filed a brief and 159 pages of supporting materials.

### C. Petitioner's Previous Law Suits Against United Brands.

On November 11, 1974, Berkson filed an action (hereinafter "*Berkson I*") in Massachusetts State Court alleging that United Fruit and its then Chairman, Eli M. Black, breached an oral agreement to sell him the Guatemala land which had been sold to Del Monte. The Massachusetts Superior Court dismissed Berkson's action and awarded costs to United Fruit. Berkson's appeal of the dismissal was itself dismissed by the Massachusetts Appeals Court on June 14, 1979.

On June 22, 1979, just eight days after dismissal of his appeal in *Berkson I*, petitioner commenced an action (hereinafter "*Berkson II*") in the United States District Court for the District of Massachusetts against United Brands and Del Monte, alleging an unlawful antitrust conspiracy. In this action, as in the state court action which preceded it, the principal wrong complained of by Berkson was United Brands' sale of the Guatemalan divestiture properties to Del Monte.

On March 21, 1983, following three and one-half years of extensive discovery, United Brands and Del Monte moved for summary judgment in *Berkson II*. On July 16, 1983, with the benefit of several hours of argument, and following review of

extensive appendices submitted by all parties, a Federal Magistrate recommended that defendants' motions "be granted on each and every ground" defendants had advanced. The Magistrate specifically found that Berkson's claims accrued at the time of the 1972 divestiture, and that there had been no fraudulent concealment of those claims by United Brands or Del Monte. These findings were adopted by the Federal District Court and affirmed by the First Circuit. The First Circuit later denied Berkson's request for rehearing *en banc* and this Court denied Berkson's petition for *certiorari*. *Berkson* v. *Del Monte Corp.*, 743 F.2d 53 (1st Cir. 1984), *cert. denied*, 470 U.S. 1056 (1985).

### D. The Current Action.

On September 25, 1986, Berkson commenced the current action in federal district court in Massachusetts. This action (hereinafter "*Berkson III*") differs from petitioner's prior suits in only two respects: (1) several new defendants have been added; and (2) the same factual allegations made in Berkson's previous suits have been recast as RICO violations.

The Federal Magistrate, Federal District Court judge, and judges of the First Circuit who have considered Berkson's current claims against United Brands have unanimously held that they are barred by settled principles of *res judicata* (Resp. App. at 1a; Pet. App. at 1a, 1k).

## Reasons for Denying the Writ.

This is not an appropriate case for exercise of this Court's discretion to grant *certiorari*. The courts below correctly dis-

missed Berkson's claims against United Brands on grounds of *res judicata*. The decision of the Court of Appeals for the First Circuit affirming the District Court's dismissal is not in conflict with the decision of any other Federal Court of Appeals on the same matter and presents no important question of federal law.

## I. The Courts Below Correctly Held that Berkson's Claims Against United Brands Are Barred by Res Judicata.

The injury alleged by Berkson as well as every factual allegation underlying his legal claims against United Brands are precisely the same as those alleged in his previous federal suit (*Berkson II*). The current case arises from the same nucleus of operative facts as the previous case. Now as before, the only injury Berkson alleges is his failure to obtain United Fruit's divestiture properties in Guatemala; and now as before the only allegations of misconduct by United Brands concern transactions and occurrences connected in time and place with the 1972 divestiture. The only difference between Berkson's two federal court actions against United Brands is that what were antitrust claims have been relabelled RICO claims. This shift in nomenclature is not enough to overcome the preclusive effects of the final judgment entered against petitioner in *Berkson II*.

It is well established that "a plaintiff may not relitigate a claim for relief by switching legal theories." 1B Moore's Federal Practice ¶0.410[1] at 361 (2d ed. 1988); Restatement (Second) of Judgments § 24, comment c (1982). The principle of *res judicata* exists to end litigation and prevent courts from rehashing cases where:

> the acts complained of and the demand for recovery are the same [and] [t]he only thing that is different is the theory of recovery.
>
> The plaintiff having alleged operative facts which state a cause of action because he tells of defendant's misconduct and his own harm has had his day in court. He does not get another day after the first lawsuit is concluded by giving a different reason than he had in the first for recovery of damages for the same invasion of his rights.

*Williamson* v. *Columbia Gas & Electric Corp.*, 186 F.2d 464, 469-470 (3d Cir. 1950), *cert. denied*, 341 U.S. 921 (1951). *See generally Montana* v. *United States*, 440 U.S. 147, 153 (1979); *Pasterczyk* v. *Fair*, 819 F.2d 12, 14 (1st Cir. 1987); *Page* v. *United States*, 729 F.2d 818, 820 (D.C. Cir. 1984); Restatement (Second) of Judgments § 24.

The courts below correctly concluded that the doctrine of *res judicata* precludes Berkson from relitigating, under the banner of RICO, his claims against United Brands, all of which are based on the 1972 divestiture sale and upon which a final judgment was entered against him in *Berkson* v. *Del Monte Corp.*, 743 F.2d 53 (1st Cir. 1984), *cert. denied*, 470 U.S. 1056 (1985).

Berkson raises for the first time in his Petition for Certiorari alleged violations of the Anti-Deficiency Act (the "Act"), 31 U.S.C. §§ 1341 *et seq*. This argument is completely irrelevant. There is no private right of action under the Act. Even if there were a private right of action, it would not overcome the *res judicata* effect of the final judgment against petitioner in *Berkson II*. *See, e.g.*, 1B Moore's Federal Practice ¶0.405[4.- 1] (1988) (Even if a final valid judgment is erroneous, it is not subject to collateral attack); *Federated Dept. Stores, Inc.* v. *Moitie*, 452 U.S. 394, 398 (1981); *United States* v. *Throck-*

*morton*, 98 U.S. 61 (1878). Moreover, the fact that petitioner now makes arguments under the Act for the first time should preclude this Court from considering them. *See*, *e.g.*, *Kosak* v. *United States*, 465 U.S. 848, 850 n.3 (1984) ("petitioner did not present this argument to the Court of Appeals, we decline to consider it"); *Miree* v. *De Kalb County*, 433 U.S. 25, 33-34 (1977); *Edward Hines Yellow Pine Trustees* v. *Martin*, 268 U.S. 458, 465 (1925).[3]

In his current petition, Berkson raises as an issue the lower courts' dismissal of his RICO claims under the statute of limitations. However, the Magistrate, in a finding adopted by the District Court and affirmed by the First Circuit, dismissed Berkson's RICO claims against United Brands because of *res judicata*, not the RICO statute of limitations (Resp. App. at 6a-8a; Pet. App. at 1c). Nevertheless, the four year statute of limitations governing RICO claims is an additional dispositive bar to petitioner's claims against United Brands. *See* argument, Section III, *infra*.

## II. The Decision of the First Circuit Below Is Not in Conflict with Any Decision of Another Federal Court of Appeals and Presents No Important Question of Federal Law.

As early as 1897, the first Justice Harlan explained the settled principle of *res judicata* as one already "announced in

[3] In further response to petitioner's Anti-Deficiency Act arguments, United Brands incorporates herein by reference the arguments contained in the brief of Respondent Covington & Burling in Opposition to Petition for Writ of Certiorari.

numerous cases." *Southern Pacific R. Co.* v. *United States*, 168 U.S. 1, 48 (1897). In the over ninety years which have passed since Justice Harlan's observation, the principle of *res judicata* has remained firmly established in American jurisprudence. *See, e.g., Chick Kam Choo* v. *Exxon Corp.*, 108 S.Ct. 1684, 1690, 100 L.Ed.2d 127, 136 (1988) (refers to "the well-recognized concept[ ] of res judicata"); *Allen* v. *McCurry*, 449 U.S. 90, 94 (1980) (observes that "[t]he federal courts have traditionally adhered to the . . . doctrine[ ] of res judicata").

The decision of the First Circuit below affirming dismissal of Berkson's claims against United Brands on *res judicata* grounds is plainly not in conflict with any decision of another federal court of appeals. Moreover, the lower courts' straightforward application of the settled doctrine of *res judicata* presents no important question of federal law.

## III. The District Court's Grant of Summary Judgment to United Brands Is Also Supported by the Statute Of Limitations.

The courts below granted judgment to respondents not entitled to assert the bar of *res judicata* on grounds — collateral estoppel and the statute of limitations — that apply with equal force to United Brands and compel judgment in its favor. This is one more reason why *certiorari* would be inappropriate. *See, e.g., Belcher* v. *Stengel*, 429 U.S. 118 (1976); *The Monrosa* v. *Carbon Black Export, Inc.*, 359 U.S. 180 (1959).

As the courts below correctly held, all of petitioner's claims based on the divestiture were time-barred because they arose no later than 1972. Moreover, the Court of Appeals specifically found that petitioner's RICO claims accrued well before Sep-

tember 25, 1982 and were, thus, untimely. Petitioner has wholly failed to identify any act occurring after September 25, 1982 that could conceivably give rise to an actionable RICO claim. The lower courts were thus correct in concluding that all of petitioner's claims are time-barred.[4]

## Conclusion.

The dismissal of Berkson's claims against United Brands was based on straightforward application of settled principles of *res judicata*. For the reasons stated, this is not an appropriate case for the exercise of *certiorari*. The petition should be denied.

Respectfully submitted,

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DATED: February 6, 1989

[4] In further support of its arguments concerning applicability of the statute of limitations, respondent United Brands adopts by reference the arguments contained in the Brief In Opposition of Respondent Goodwin, Procter & Hoar.

# APPENDIX

## UNITED STATES DISTRICT COURT
## DISTRICT OF MASSACHUSETTS

Civil Action No.
86-2775-N

HERBERT D. BERKSON,
Plaintiff

v.

DEL MONTE CORPORATION, ET AL.,
Defendants

REPORT AND RECOMMENDATION ON DEFENDANTS' MOTIONS TO DISMISS OR, IN THE ALTERNATIVE, MOTIONS FOR SUMMARY JUDGMENT

April 23, 1987

COHEN, M.

Plaintiff, Herbert D. Berkson, commenced this action on September 25, 1986. This represents his second trip to this court, and third trip to federal courts, complaining about matters attendant to the divestiture of the United Fruit Company. Although primarily based on the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*, plaintiff's complaint includes claims for common law fraud, intentional interference with contractual and business relations, breach of fiduciary duty, and disclosure of "confidential business and proprietary information belonging to plaintiff

in connection with the purchase of the divestiture properties of the United Fruit Company, now United Brands . . . in Guatemala, Central America." Plaintiff's Complaint § 1. Also mentioned in the body of the complaint are claims for violations of the Sherman and Clayton Acts, the Securities Exchange Act of 1934, 15 U.S.C. § 78n(e), and various criminal statutes not part of RICO.[1]

Plaintiff has named as defendants Del Monte Corp., United Brands Co., Price Waterhouse, Palmer & Dodge, Goodwin, Procter & Hoar, Pillsbury, Madison & Sutro, Covington & Burling, William P. Rogers, Henry A. Kissinger and Nathaniel Davis.

All defendants have moved to dismiss plaintiff's complaint, or in the alternative for summary judgment, based on res judicata, collateral estoppel, statute of limitations, failure to state a claim upon which relief can be granted and immunity.

## I. BACKGROUND

In 1954, the United States commenced an action in Louisiana federal court against United Fruits (the predecessor of United Brands) for violations of the Sherman Act. In 1958, a consent decree was entered into by the parties. Article VIII of the decree required United Brands to divest itself of part of its banana producing properties.

In 1970, properties in Guatemala were approved for sale by the Louisiana court and United Brands entered into negotiations

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[1] These criminal statutes — 18 U.S.C. §§ 371, 1621, 1622, 1623, 1005, 1546 and 2071 — are not predicate offenses within the meaning of RICO's definitions of "racketeering activity." *See* 18 U.S.C. § 1961(1). As a result, they cannot form the bases of a RICO claim. *See United States* v. *Pepe*, 747 F.2d 632, 645 (11th Cir. 1984). Nor do purely criminal statutes provide private right of action to a civil litigant such as plaintiff. *See, e.g., Dugar* v. *Coughlin*, 613 F. Supp. 849, 852 n.1 (S.D.N.Y. 1985) (no private right of action under 18 U.S.C. § 371); *Fiorino* v. *Turner*, 476 F. Supp. 962, 963 (D. Mass. 1979) (same); *Weiland* v. *Byrne*, 392 F. Supp. 21, 22 (N. D. Ill. 1975) (private litigant does not have standing under 18 U.S.C. § 1621).

with Del Monte for the purchase of the properties. However, in 1971, the Guatemalan government disapproved Del Monte as a buyer and indicated that it would prefer to deal with Guatemalan nationals. In 1972, Del Monte successfully resumed its efforts to purchase the properties; Guatemala approved Del Monte as a purchaser and the sale was confirmed by the Louisiana court. The divestiture occurred on December 14, 1972.

According to plaintiff, he and a Guatemalan, Julian Presa, had formed an enterprise, the Pan Tropic Fruit Company, to purchase the divestiture properties. Plaintiff appeared as *amicus curiae* at the hearing before the Louisiana court to oppose the sale of the properties to Del Monte. He has been challenging the results of the divestiture ever since.

In November 1974, plaintiff filed an action in Massachusetts state court against United Fruit and Eli M. Black, United's then chairman. Plaintiff alleged that United Fruit and Black had breached an oral contract to sell to him the divestiture properties. This suit was dismissed by the state court, as was plaintiff's appeal to the Massachusetts Appeals Court.

Shortly after the dismissal of his appeal in June, 1979, plaintiff commenced an action in this Court, Civil Action No. 79-1180-T. Plaintiff named as defendants Del Monte and United Brands; he alleged that they violated the federal antitrust laws by excluding companies other than Del Monte from purchasing United Brands' Guatemala properties, by undermining plaintiff's efforts to purchase the properties, by refusing to divulge information and divulging false information concerning the properties, by using bribery and political pressure to obtain Guatemalan approval of Del Monte as the purchaser, and by withholding information from the Louisiana federal court in 1972.

In March, 1983, United Brands and Del Monte moved for summary judgment. In July, 1983, after submission of briefs

and oral argument, Magistrate DeGiacomo recommended that defendants' motions be granted. He found that plaintiff's action was time-barred, that plaintiff lacked standing under the Clayton Act, that the Act of State Doctrine barred plaintiff's action and that plaintiff's suit was an impermissible collateral attack on the consent decree and judgment of the Louisiana federal court. The District Court approved the Magistrate's recommendation and granted defendants' motions for summary judgment in August, 1983.

Plaintiff appealed to the United States Court of Appeals for the First Circuit. On September 17, 1984, the First Circuit affirmed the District Court's grant of summary judgment on the ground that the action was time-barred. *Berkson* v. *Del Monte Corp.*, 743 F.2d 53 (1st Cir. 1984). Plaintiff petitioned the United States Supreme Court for *certiorari*. The petition was denied in March, 1985. 105 S.Ct. 1765 (1985). Plaintiff thereafter filed the instant action.

## II. DISCUSSION

### A. *Summary Judgment Standard*[2]

"Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp.* v. *Catrett*, 106 S. Ct. 2548, 2555 (1986) (quoting Fed. R. Civ. P. 1). To survive defendants' motions for summary judgment, plaintiff must demonstrate that there is a genuine issue of material fact requiring a trial. Fed. R. Civ. P. 56(e); *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 106 S. Ct. 1348, 1355-56 (1986). As the Supreme Court recently has made clear, the standard for granting sum-

[2] Because papers outside the pleadings have been considered, this court will treat the instant motions as motions for summary judgment. Fed. R. Civ. P. 12(b).

mary judgment "mirrors" the standard for a directed verdict under Fed. R. Civ. P. 50(a). *Anderson* v. *Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2511 (1986). That is, the inquiry focuses on "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 2512. "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita,* 106 S.Ct. at 1356 (citing *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 289 (1968)).

In determining defendants' motion for summary judgment, this court must view the evidence and all inferences in the light most favorable to the party opposing the motion. *Hahn* v. *Sargent,* 523 F.2d 461, 464 (1st Cir. 1975) (citations omitted), *cert. denied,* 425 U.S. 904 (1976). However, plaintiff may not obtain a trial merely on the allegations in his complaint, *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 289-90 (1968), or by showing that there is "some metaphysical doubt as to the material facts," *Matsushita, supra,* 106 S. Ct. at 1356 (citations omitted). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson,* 106 S. Ct. at 2510.

Plaintiff's complaint can be read to concern two distinct sets of events. First are his allegations that the 1972 method of divestiture and the incidents surrounding it violated RICO, other laws, and common law rights belonging to plaintiff. Second, plaintiff complains about the defendants' actions during the prior federal suit in this court. Because different legal standards apply to each of these claims, this court will address each separately.

B. *Claims Based on the 1972 Divestiture*

1. United Brands and Del Monte

United Brands and Del Monte, the two defendants in the prior federal action, claim that plaintiff's RICO claims against them are barred by the doctrine of *res judicata,* or claim preclusion. That conclusion is inescapable in the circumstances.

Under this doctrine, "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Allen* v. *McCurry,* 449 U.S. 90, 94 (1980). A grant of summary judgment is a judgment on the merits. *See Rose* v. *Town of Harwich,* 778 F.2d 77 (1st Cir. 1985), *cert. denied,* 106 S.Ct. 2278 (1986); *Isaac* v. *Schwartz,* 706 F.2d 15, 17 (1st Cir. 1983) (dismissal for failure to state a claim under Rule 12(b)(6) is a judgment on the merits); 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice* ¶0.409 [1.-2] (1984) (judgment on motion for summary judgment is on the merits).

The bar of res judicata, however, is limited to cases arising out of the same claim or cause of action. *Manego* v. *Orleans Board of Trade,* 773 F.2d 1, 5 (1st Cir. 1985), *cert. denied,* 106 S.Ct. 1466 (1986). This Circuit has adopted the approach of § 24 of the *Restatement (Second) of Judgments* in determining when two cases concern the same claim. *Id.*

> § 24. Dimensions of "Claim" for Purposes of Merger or Bar — General Rule Concerning "Splitting"
>
> (1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar. . . , the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.

> (2) What factual grouping constitutes a "transaction", and what groupings constitute a "series", are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

*Restatement (Second) Judgments* § 24 (1982).

Plaintiff cannot avoid res judicata by pleading different legal theories or by adding new defendants. *Manego*, 773 F.2d at 6; *Restatement*, § 24, comm. c., § 25, comm. d. As the comments to § 24 point out:

> That a number of different legal theories casting liability on an actor may apply to a given episode does not create multiple transactions and hence multiple claims. This remains true although the several legal theories depend on different shadings of the facts, or would emphasize different elements of the facts, or would call for different measures of liability or different kinds of relief.

§ 24, comm. c. Similarly, when a judgment is on statute of limitations grounds, as in plaintiff's prior suit, the bar is not avoided by shifting the legal theory on which the claim is pitched. *Moore's Federal Practice*, ¶0.409[6]. If the transaction underlying the two suits is the same, res judicata is a bar to the second suit.

There is no doubt that the underlying facts of the RICO claim are precisely the same as the facts underlying the antitrust claim. Plaintiff's first complaint concerned alleged violations of the antitrust laws based on the 1958 consent decree and 1972

divestiture of the Guatemalan banana properties. His second complaint involves the same occurrences, but alleges that the divestiture and those who took part in it violated RICO. This court has carefully reviewed plaintiff's pleadings in this case and is unable to find any factual allegations indicating that plaintiff's current action grows out of a different transaction than that alleged in his first suit.

Widening the alleged conspiracy to include government officials and law firms does not change this result; the fact is that the actions of the new defendants which are alleged to violate RICO are the same actions about which plaintiff has complained in the prior suit. Plaintiff adds little that is different in this action and any minor differences that he does allege do not transform his second suit into a new cause of action. *See Manego,* 773 F.2d at 6. Res judicata, then, bars all of plaintiff's claims which concern the 1972 divestiture.[3]

2. The Remaining Defendants

The remaining defendants, not parties to the prior suit, also argue that *res judicata* bars this present RICO action against them. Although there is some support for the position that strangers to the first action may claim the effects of *res*

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[3] Plaintiff argues that, because none of the defendants had been convicted under RICO, he could not have brought his RICO suit until 1985 when the United States Supreme Court resolved a conflict among the Circuit and district courts. *See Sedima, S.P.R.L.* v. *Imrex Co.,* 105 S.Ct. 3275 (1985) (holding that a RICO private treble damages action may be brought even though defendants have not been criminally convicted of a predicate act under RICO). Plaintiff seeks far too much from far too little. The mere fact that a conflict existed does not excuse a litigant from asserting all claims. The very existence of a conflict indicates that the claim was not frivolous, and plaintiff's choice not to pursue a RICO claim at that time is not a valid defense to the doctrine of *res judicata.*

*judicata*,[4] that is not the law, except in limited circumstances, in this circuit.[5]

In *Manego* v. *Orleans Board of Trade*, the First Circuit Court of Appeals affirmed the trial court's decision that *res judicata* did not apply to a defendant which was not a party to the prior suit. 773 F.2d at 7, *affirming* 598 F. Supp. 231, 235 (D. Mass. 1984); *see also Valentin* v. *United States Postal Service*, 787 F.2d 748, 750 and n.1 (1st Cir. 1986) (res judicata available only to "parties or their privies"); *Sierra Club* v. *Secretary of Transportation*, 779 F.2d 776, 779 (1st Cir. 1985) (basic prerequisites of res judicata are finality of judgment, *identity of parties* and identity of claim).

The First Circuit cases on which defendants rely exemplify the limited exceptions to the mutuality requirement and are not applicable in this case. For example, in *Capraro* v. *Tilcon Gammino, Inc.*, 751 F.2d 56 (1st Cir. 1985), the court held that the parent of a wholly-owned subsidiary could take advantage of *res judicata*, even though only its subsidiary was a defendant in the first suit. *Id.* at 59 (citing § 59(3) of the *Restatement (Second) of Judgments*, which specifically concerns holders of ownership in corporations). The court held

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[4] Permitting "nonmutual claim preclusion" would be attractive in this case which reflects "no more than a last desperate effort by a plaintiff who is pursuing a thin claim against defendants who were omitted from the first action because they were less directly involved than the original defendants." 18 C. Wright, W. Miller & E. Cooper, *Federal Practice and Procedure*, § 4464, at 588-89 (1981). Professors Wright, Miller and Cooper suggest a limited rule that would permit nonmutual claim preclusion only when the new defendant can show why he should have been joined in the first suit and plaintiff cannot show any good reasons justifying a second chance. *Id.* at 589. This, however, is not the law of this Circuit.

[5] Defendants seemingly argue that the fact that a claim may be the same for *res judicata* purposes even if new defendants are present in the second suit means that those new defendants may also claim the bar of *res judicata*. Section 24's test, however, is only aimed at determining when the same transactions underly two claims once the prerequisites to res judicata already apply, namely, identity of parties.

that under the requirements of § 59(3), the subsidiary had acted at the direction of its parent. *Id.*

Another exception to the rule that there must be identity of parties appears in *Mashpee Tribe* v. *Watt*, 707 F.2d 23 (1st Cir.), *cert. denied*, 464 U.S. 1020 (1983). The claims in *Mashpee Tribe* concerned title to land. When property rights are at stake, new defendants may claim the bar of res judicata. *Id.* at 24-25 (citing *Restatement (Second) of Judgments* §§ 25, 43 comm. c.).

Notwithstanding these limitations, however, defendants may assert the benefits of collateral estoppel, or issue preclusion, on at least those claims of plaintiff involving the 1972 divestiture. *See Manego*, 598 F. Supp. at 236 (stranger to first action may defensively assert principles of issue preclusion) (citing *Parklane Hosiery* v. *Shore*, 439 U.S. 322 (1979)). Collateral estoppel applies when an issue of fact or law is actually litigated and determined by a final judgment and the determination is essential to the judgment. *Restatement (Second) Judgments* § 27; *Manego*, 598 F. Supp. at 236.

The Court of Appeals in *Berkson* v. *Del Monte Corp.* concluded that plaintiff's antitrust claim based on the 1972 divestiture arose no later than December, 1972, and that there was no fraudulent concealment of this claim. 743 F.2d at 55-57. Despite plaintiff's arguments to the contrary, there is no doubt that he had a full and fair opportunity to litigate these issues; when issues are submitted and determined on motions for summary judgment such issues have been "actually litigated." *Restatement*, § 27, comm. d. Also, the factual determinations regarding the bar of the statute of limitations were necessary to the judgment of the Court of Appeals in the prior suit as they were the bases for the affirmance of the district court's grant of summary judgment. *See Berkson* v. *Del Monte Corp.*, 743 F.2d at 57.

Plaintiff's prior suit was based on antitrust law. The instant suit is premised on alleged RICO violations. However, the change in legal theory cannot disguise the fact that plaintiff's two causes of action are grounded on the same transaction — the 1972 divestiture. Plaintiff alleges no new facts regarding the events surrounding the sale of United Brands' Guatemalan banana properties. Thus, the issue of when the antitrust claim arose is identical to the issue of when the RICO claim arose. Both arose by December, 1972. *Cf. Wilson* v. *Retail Credit Co.*, 474 F.2d 1260, 1261 & n.2 (5th Cir. 1973) (finding that statute of limitations barred plaintiff's libel claim is entitled to collateral estoppel where same facts underly plaintiff's new cause of action based on different legal theory).

That plaintiff's RICO claim is time-barred is obvious.[6] Plaintiff attempts to avoid the statute of limitations, as he did in the prior suit, by alleging fraudulent concealment. He asserts that it was only during the discovery process of the prior suit that he learned of the facts on which his RICO claims are premised. Complaint ¶16. Without specifying what these facts are, he broadly alleges that after commencing his action, he discovered that the government agencies involved in the divestiture were not "faithfully executing the laws of the United States." *Id.*

However, the Court of Appeals found that Berkson did not use due diligence in discovering the facts underlying his antitrust cause of action and, thus, that he did not meet the requirements to invoke the doctrine of fraudulent concealment. 743 F.2d at 56-57. Because the *facts* on which both claims are premised are identical, the finding of lack of due diligence precludes plaintiff from relitigating whether any of these new defendants fraudulently concealed his RICO claim.

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[6] This is so no matter what statute of limitations applies. *See infra.*

Plaintiff already has had his one bite at the apple to litigate the statute of limitations issues; he is not entitled to yet another. As the United States Supreme Court has made clear:

> Permitting repeated litigation of the same issue as long as the supply of unrelated defendants holds out reflects either the aura of the gaming table or "a lack of discipline and of disinterestedness on the part of the lower courts, hardly a worthy or wise basis for fashioning rules of procedure." *Kerotest Mfg. Co.* v. *C-O-Two Co.*, 342 U.S. 180, 185 (1952).

*Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313, 329 (1971). Moreover, collateral estoppel acts to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." *Allen* v. *McCurry*, 449 U.S. 90, 94 (1980). This case readily invites — indeed, demands — application of these principles. All of plaintiff's claims based on the 1972 divestiture are time-barred as to these new defendants as well.

C. *Claims Based on Events in the Prior Federal Action*

In his complaint, plaintiff charges that some defendants acted improperly in the prior federal action. Specifically, plaintiff claims that Palmer & Dodge and Goodwin, Procter & Hoar (attorneys for Del Monte and United Brands respectively) misled the court about the facts, "blinded" the court, aided the court in "expunging" a document from court records, influenced the decision of Magistrate DeGiacomo and wrote the Magistrate's Decision for him.[7] Plaintiff additionally charges

[7]It is not insignificant, of course, that the judgment in the prior litigation was entered by the district judge — not the magistrate — and affirmed by the United States Court of Appeals.

[*footnote continued*]

Palmer & Dodge with refusing to correct, in open court, an incorrect answer to an interrogatory,[8] and with filing false affidavits. Similarly, plaintiff asserts that Del Monte filed false affidavits.

To the extent that these claims are alleged to violate RICO, they are barred by the applicable statute of limitations.

Because RICO contains no limitations period, this court must apply the most analogous state statute of limitations. *Wilson* v. *Garcia*, 471 U.S. 261 (1985). Under the test announced in *Garcia*, courts first must decide whether all causes of action under a particular federal statute should be characterized in the same way for limitations purposes, or whether individual determinations should be made based upon the underlying fact patterns in each case. *Id.* at 271-75. Courts that have addressed this issue in the context of RICO have reached opposite conclusions. *Compare Malley-Duff & Associates, Inc.* v. *Crown Life Insurance Co.*, 792 F.2d 341, 349, 352-53 (3d Cir. 1986) (court must choose *one* analogous state statute of limitations for all RICO claims; court chose state's catchall limitations statute for claims based on statute), *cert. granted*, 107 S.Ct. 569 (1987), with *Silverberg* v. *Thomson McKinnon Securities, Inc.*, 787 F.2d 1079, 1083 (6th Cir. 1986) (court must look to characterization of underlying facts in particular cases to determine analogous state statute of limitations; court chose limitations period for common law fraud).

Because Massachusetts does not have a limitations period specifically applicable to statutory causes of action, the most

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Plaintiff also asserts that Pillsbury, Madison & Sutro and Covington & Burling misled the court in the prior action. As there is no evidence that these two law firms were involved in the prior federal suit, it is difficult to see to what plaintiff is referring. To the extent plaintiff is complaining about actions that took place before the Louisiana federal district court in the early 1970s, his claim clearly is time-barred. *See* Part IIB, *supra*.

[8] In the answer, Del Monte gave the name of a bank incorrectly. The proper name was City National Bank; the answer to the interrogatory identified the bank as the First National Bank of Miami.

analogous statute of limitations under either prong of the test, is the three year limitations period contained in M.G.L. c. 260, § 2A.[9] Thus, plaintiff's cause of action is barred if it accrued prior to September 25, 1983.

The actions about which plaintiff complains specifically concern the issuance of Magistrate DeGiacomo's Report and Recommendation in July 1983. At the latest, plaintiff should have been aware of his cause of action by August 1983, when the district judge approved the magistrate's report, and entered judgment thereon, and plaintiff offers nothing to indicate that he was not, or was prevented from being, so aware.

Based on the foregoing, then, plaintiff's RICO claims based on defendants' alleged actions in the prior suit are likewise barred by the statute of limitations.

## III. CONCLUSION

For the reasons set forth above, this Court accordingly recommends[10] that defendants' various motions for summary

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[9] M.G.L. c. 260, § 2A provides:

> § 2A. Three years; actions of tort, contract to recover for personal injuries and replevin
>
> Except as otherwise provided, actions of tort, actions of contract to recover for personal injuries, and actions of replevin, shall be commenced only within three years next after the cause of action accrues.

Although no court within the First Circuit has appeared to have decided this precise question, the court in *UST Capital Corp.* v. *Charter Nat'l Life Insurance Co.*, No. 77-21-Z, slip op. (D. Mass. 1986), agreed with the parties that § 2A governed in a RICO action based on fraud. Here, also, plaintiff's allegations concerning the defendants' actions in the prior suit most resemble claims that the defendants perpetrated a fraud upon the court.

[10] The parties are hereby advised that under the provisions of Rule 3(b) of the Rules for United States Magistrates in the United States District Court for the District of Massachusetts, any party who objects to these proposed findings and recommendations must file a written objection thereto with the Clerk of this Court within 10 days of the party's receipt of this Report and Recommendation. The written objections must specifically identify the portion of the proposed findings, recommendations, or report to which objection is made and

judgment be allowed, and that judgment accordingly enter for the defendants.

/s/

UNITED STATES MAGISTRATE

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the basis for such objections. The parties are further advised that the United States Court of Appeals for this Circuit has indicated that failure to comply with this rule shall preclude further appellate review. See *United States* v. *Emiliano Valencia-Copete*, 792 F.2d 4 (1st Cir. 1986); *Park Motor Mart, Inc.* v. *Ford Motor Co.*, 616 F.2d 603 (1st Cir. 1980); *United States* v. *Vega*, 678 F.2d 376, 378-379 (1st Cir. 1982); *Scott* v. *Schweiker*, 702 F.2d 13, 14 (1st Cir. 1983); see also, *Thomas* v. *Arn*, U.S. , 106 S.Ct. 466 (1985).

(5)

Supreme Court, U.S.
FILED
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CLERK

No. 88-1019

# In the Supreme Court of the United States

OCTOBER TERM, 1988

HERBERT D. BERKSON,
PETITIONER,

*v.*

DEL MONTE CORPORATION, *et al.*,
RESPONDENTS.

## BRIEF OF RESPONDENT COVINGTON & BURLING IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Should this Court consider a claim that respondents have violated the Anti-Deficiency Act, where (a) no such claim was pleaded in the complaint or presented to either of the lower courts; and (b) there is no basis on which to hold that the statute provides for a private right of action or for an action against private parties?

2. Should this Court review the purely factual determination of when the statute of limitations began to run on petitioner's claims, a determination that has twice been made and resolved against petitioner by the lower courts?

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# In the
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OCTOBER TERM, 1988

No. 88-1019

HERBERT D. BERKSON,
PETITIONER,

*v.*

DEL MONTE CORPORATION, *et al.*,
RESPONDENTS.

## BRIEF OF RESPONDENT COVINGTON & BURLING IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

### Counterstatement of the Case

This case represents petitioner's third effort to recover on claims that are now nearly twenty years old. It is petitioner's second effort to secure review of those claims by this Court. We briefly set forth here the pertinent facts and holdings of the lower courts.[1]

[1] For the Court's convenience, an appendix has been included consisting of (i) the Report and Recommendation filed by Magistrate Cohen on April 23, 1987, and subsequently adopted by the district court, (ii) the district court's May 29, 1987, judgment, (iii) the June 29, 1988, unpublished opinion of the First Circuit affirming the district court judgment, and (iv) the opinion of the First Circuit in petitioner's prior antitrust suit, which is published at 743 F.2d 53 (1st Cir. 1984), *cert. denied*, 470 U.S. 1056 (1985). Citiitions to this appendix are in the form ("App. __.").

In 1958, United Fruit, the predecessor of respondent United Brands, settled an antitrust action brought by the Department of Justice. The parties consented to the entry of a decree that, *inter alia*, required United Fruit to divest itself of certain banana-growing properties in Central America. *United States* v. *United Fruit Company.*, C.A. 4560 (E.D. La. 1958). Covington & Burling represented United Fruit, and then United Brands, in that proceeding. That representation is this respondent's sole involvement in the events that underlie a series of law suits subsequently brought by petitioner.

United Fruit initially planned to comply with the decree by selling certain properties in Panama, and in 1967, its plan to do so was approved by both the Justice Department and by the Honorable Seybourn Lynne, the federal judge supervising the decree. Ultimately, the Panamanian government refused to permit the sale to go forward, and the plan was abandoned in 1970. Instead, it was determined that United Brands should divest itself of certain banana-growing properties in Guatemala.

On November 29, 1972, Judge Lynne approved United Brands' proposal to sell the Guatemalan properties to Del Monte. Petitioner, in association with a Guatemalan national, was interested in purchasing those properties. Before approving the sale, Judge Lynne received petitioner's brief (and supporting materials) in opposition to the sale and permitted petitioner to address the court at length with respect to his objections. The court-approved sale has been the target of all the litigation subsequently initiated by petitioner.

Petitioner's first collateral attack on the divestiture sale was commenced in 1974, when he sued United Brands and its then-Chairman, Eli M. Black, for alleged breach of an oral agreement to sell the Guatemalan properties to petitioner and his group. That action was dismissed by the Massachusetts trial court in 1978, and petitioner's appeal was dismissed by the state appellate court in June, 1979. *Berkson* v. *United Brands Co., et al.*, Civil Action No. 2824 (Mass. Super. Ct. 1978), *appeal dismissed*, No. 79-153 (Mass. App. 1979).

In June, 1979, following the dismissal of his state case, petitioner turned to the federal courts in his next effort to undo the court-approved sale. Petitioner brought suit against United Brands and Del Monte for alleged violations of the federal antitrust laws. As part of that suit, petitioner alleged that United Brands and Del Monte had made bribes and other "questionable payments" to Guatemalan officials in order to gain approval of the sale. Petitioner similarly accused the two companies of having lied to Judge Lynne in 1972 to conceal the alleged bribery. As petitioner acknowledges, his knowledge of these alleged "questionable payments" dates from at least July 14, 1975—the date of an article in the *Wall Street Journal* disclosing certain payments by Del Monte to a consultant in Guatemala. (Pet. 3.)

After extensive discovery, the district court entered judgment against petitioner on the independent grounds that his antitrust claims were barred by the statute of limitations, the Act of State doctrine, the failure to prove injury to "business or property" as required by Section 4 of the Clayton Act,[2] and because the suit was an impermissible collateral attack on the 1958 consent decree and the related proceedings before Judge Lynne. Petitioner appealed the judgment to the Court of Appeals for the First Circuit, which affirmed. *Berkson* v. *Del Monte Corp.*, 743 F.2d 53 (1st Cir. 1984), *cert. denied*, 470 U.S. 1056 (1985).

That court held that petitioner's antitrust complaint was "based entirely on actions occurring before the consummation of the 1972 sale; no subsequent overt act in furtherance of the alleged conspiracy is described or even hinted at. It is clear, therefore, that Berkson's cause of action accrued no later than December, 1972. . . ." (743 F.2d at 55; App. A-21-22.) The court therefore concluded that the action was untimely "[o]n its face." (*Id.*; App. A-22.)

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[2] The district court's holding in this respect was based on overwhelming evidence developed in the course of the prior litigation that petitioner was wholly unable successfully to operate a banana plantation.

The court then reviewed petitioner's allegations of fraudulent concealment and found that there was "no trace of any allegation, let alone a showing sufficient to raise a genuine issue of fact," on critical elements of that charge. (743 F.2d at 55-56; App. A-23.) It expressly found that petitioner "voiced his suspicions and filed an *amicus curiae* brief before the United States District Court for the Eastern District of Louisiana in 1972, when he opposed the sale to Del Monte on grounds *virtually identical* to those advanced in the present case." (*Id.* at 56; App. A-24) (emphasis supplied). The court found "absolutely no indication" that petitioner had made any " 'conscientious effort' to substantiate the suspicions he voiced to the district court in Louisiana in 1972." (*Id.*; App. A-25.) It therefore affirmed the judgment of the district court. Petitioner then sought review in this Court, which was denied. 470 U.S. 1056 (1985).

Petitioner commenced the instant action, his third collateral attack on the court-approved sale, in late September, 1986. Although allegations of fraud and corruption permeated petitioner's earlier actions as well as his argument before Judge Lynne, and although petitioner was obviously aware of the firm's role in the divestiture proceeding, he raised no claim against Covington & Burling until he filed the current action. Unlike the prior federal action, petitioner's current suit focuses on alleged violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.* (1986). The complaint affirmatively acknowledges that the facts underlying the current action are the same as those underlying the earlier antitrust suit. (*See, e.g.*, Complaint ¶¶ 1, 16.) It mentions Covington & Burling in only four of its 61 paragraphs, and the most specific fact that is pleaded concerning this respondent is its address.[3]

[3] In addition to Covington & Burling, petitioner sued Del Monte, United Brands, three other law firms (Goodwin, Procter & Hoar, Palmer & Dodge, and Pillsbury, Madison & Sutro), an accounting firm (Price Waterhouse), and three former government officials (Nathaniel Davis, Henry A. Kissinger, and William Rogers).

All defendants moved for judgment shortly after the filing of the complaint. The district court referred the motions to a Magistrate, who recommended on April 23, 1987, that each defendant's motion be granted. The district court thereupon granted summary judgment for all defendants on May 29, 1987, based on the report and recommendation of the Magistrate. With respect to the claims relating to the court-approved sale, the court held that petitioner's claims against respondents United Brands and Del Monte, who were parties to the prior antitrust action, were "barred by the doctrine of *res judicata*, or claim preclusion. That conclusion is inescapable in the circumstances." (Magistrate's Report at 6; App. A-5.)

The remaining respondents, including Covington & Burling, were entitled to "assert the benefits of collateral estoppel, or issue preclusion, on at least those claims of plaintiff involving the 1972 divestiture." (Magistrate's Report at 11; App. A-9.) The court had "no doubt" that petitioner "had a full and fair opportunity to litigate" the statute of limitations issue (including any claim of fraudulent concealment) in his earlier antitrust action. (Magistrate's Report at 11; App. A-10.) Moreover, "the factual determinations regarding the bar of the statute of limitations were necessary to the judgment of the Court of Appeals in the prior suit. . . ." (Magistrate's Report at 11; App. A-10.)

The court considered whether petitioner's current case was based on the same facts as his earlier antitrust action. It found that there was "no doubt that the underlying facts of the RICO claim are precisely the same as the facts underlying the antitrust claim." (Magistrate's Report at 8; App. A-7.) The court was "unable to find any factual allegations indicating that plaintiff's current action grows out of a different transaction than that alleged in his first suit." (*Id.*; App. A-7.) Thus, petitioner's change in legal theory was entitled to no weight.

> "[T]he change in legal theory cannot disguise the fact that plaintiff's two causes of action are grounded on the same transaction—the 1972 divestiture. Plaintiff alleges no new facts regarding the events surrounding the sale of United Brands' Guatemalan banana properties. Thus, the issue of when the antitrust claim arose is identical to the issue of when the RICO claim arose. Both arose by December, 1972.
>
> * * *
>
> "That plaintiff's RICO claim is time-barred is obvious." (Magistrate's Report at 11-12; App. A-10.)

Based on these factual findings, as well as the First Circuit's earlier opinion, the district court concluded that petitioner's RICO claims, like his earlier antitrust claims, were untimely and that principles of collateral estoppel barred relitigation of that issue. (*Id.* at 13-14; App. A-11-12.)[4]

The district court's judgment was affirmed in a *per curiam* opinion of the Court of Appeals for the First Circuit, "substantially for the reasons stated in the magistrate's report and recommendation adopted by the district court." (First Circuit opinion at 3; App. A-17.) The Court of Appeals specifically considered this Court's intervening opinion in *Agency Holding Corp.* v. *Malley-Duff & Associates*, 483 U.S. 143, 107 S. Ct. 2759, 2767 (1987), that the four-year statute of limitations governing actions under the Clayton Act was the applicable limitations period for civil RICO actions and concluded that "this adjustment does not affect plaintiff's claims based on the 1972 divestitute. Those claims remain long time-barred under the new standard." (*Id.* at 4; App. A-18.)

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[4] The district court's judgment separately considered petitioner's claims based on the 1972 court-approved sale and those based on alleged misconduct by the defendants in the prior antitrust litigation. The court found that Covington & Burling had no involvement whatsoever in the alleged misconduct in petitioner's earlier antitrust case, and the complaint alleges no touch by Covington & Burling with the subject matter of this action following the conclusion of the divestiture proceeding on November 29, 1972. (Magistrate's Report at 13-14 and n.7; App. A-11-12).

The Court of Appeals pointed to petitioner's admitted awareness of the alleged bribery of Guatemalan officials since "the 'bribe' was reported in a 1975 article in the *Wall Street Journal.*" (First Circuit opinion at 6; App. A-19.) And the court also addressed certain other facts in the record establishing that petitioner's "claims under RICO accrued before September 25, 1982 and are therefore time-barred even under *Agency Holding Corp., supra,* 107 S. Ct. 2759." (*Id.* at 5; App. A-18.) Petitioner's motion for rehearing was denied in an order dated September 15, 1988. (Pet. 1j.)

In this Court, petitioner challenges the holdings below that his action was untimely. But petitioner has nowhere shown that any respondent committed any act within the four year limitations period that could form a basis of civil RICO liability. Petitioner submitted voluminous briefs and appendices to both the district court and the Court of Appeals but was unable to identify any conduct within four years of the filing of his complaint. Nor is any such conduct identified in the petition for writ of certiorari. And petitioner has similarly failed to identify any conduct by Covington & Burling subsequent to the 1972 court-approved divestiture sale.[5]

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[5] Petitioner continues to assert that the "law firms representing said Del Monte and United Fruit, in some instances submitted perjured affidavits...." (Pet. 16.) As the Court of Appeals recognized, the only "documentation" for this charge (which has never been made against this respondent) is simply petitioner's allegations. (First Circuit opinion at 4-5; App. A-18.)

Petitioner also claims that Covington & Burling has admitted to acting in league with government officials in a manner that "is in stark violation of the 'Anti-Deficiency Act' (U.S. Code 1982, Title 31)...." (Pet. 17-18.) This claim is based on a continued misreading and misstatement of the twelfth defense of Covington & Burling's answer to the complaint. That defense states:

> "If this defendant committed acts alleged in the Complaint, *which it denies*, it is immune from suit *to the extent* that it took action in concert with officials of the United States Government who were acting pursuant to their official duties." (emphasis supplied)

As the answer makes clear, Covington & Burling denied each and every allegation of wrongdoing on its part made by petitioner. The defense of immunity was asserted strictly in the alternative and played no role whatsoever in either of the decisions below.

## Reasons for Denying the Writ

Petitioner has offered no reason, let alone any "special and important" reason, why this case warrants review by this Court. (Rule 17.1.) The petition does not frame an issue of constitutional or statutory significance and concentrates on an issue not raised below.

The Anti-Deficiency Act, 31 U.S.C. § 1341 *et seq.* (1986), which petitioner invokes for the first time in this long-continuing litigation, is wholly irrelevant. It is a criminal statute that applies by its terms only to government employees and creates no private right of action. Dismissal of petitioner's action on the ground that it is time-barred is amply supported by findings of fact made by the lower courts which this Court does not sit to review.

### I. The Contention That the Anti-Deficiency Act Was Violated Does Not Warrant Consideration.

The Anti-Deficiency Act, 31 U.S.C. § 1341 (1986), states in relevant part that

> "(a)(1) An officer or employee of the United States Government or of the District of Columbia government may not—
>
> (A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; or
>
> (B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law."[6]

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[6] Section 1342 states that these same employees "may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property."

Any such employee who "knowingly and willfully" violates either section 1341(a) or section 1342 "shall be fined not more than $5,000, imprisoned for not more than 2 years, or both." 31 U.S.C. § 1350 (1986).

Petitioner advances for the first time in this Court a claim that this statute has been violated. Because this claim was not presented below, it should not be considered by this Court. Moreover, there is no basis whatsoever for a holding that the Anti-Deficiency Act provides for a private right of action or for an action against private parties. Absent such a right, petitioner's claim cannot be sustained.

A. *No Such Claim Was Presented in the Lower Courts.*

Petitioner's complaint described the nature of his action as follows:

> "This is an action to recover damages for securities fraud, civil violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), common law fraud, intentional interference with business and contractural (sic) relations, breach of fiduciary duty, misuse and improper disclosure of confidential business and proprietary information belonging to plaintiff in connection with the purchase of the divestiture properties of the United Fruit Company, now United Brands ("United"), in Guatemala, Central America." (Complaint ¶1.)

*Nowhere did petitioner's complaint plead a claim under the "Anti-Deficiency Act."*

Throughout this litigation, plaintiff has pursued his claim as one under the RICO statute. Thus, the district court understood that petitioner raised claims "primarily based on the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*. . . ." (Magistrate's Report at 1; App. A-1.) At no time did petitioner brief or even mention in the district court what is now the primary issue

submitted for consideration by this Court—an asserted violation of the Anti-Deficiency Act. Nor did the district court consider such a claim.

Similarly, petitioner ignored the Anti-Deficiency Act in the Court of Appeals. Thus, in his brief to the First Circuit, petitioner argued that his current action was "in nexus" with his earlier antitrust case. (Br. 2.) That same brief (at pp. 7-9) identified a series of 13 criminal statutes that petitioner contended had been violated by the respondents, including, *inter alia*, 18 U.S.C. § 371 (Conspiracy to Defraud the United States), 18 U.S.C. § 1005 (Banking Fraud), and 18 U.S.C. §§ 1341, 1343 (Mail and Wire Fraud). Nowhere in his briefs to the Court of Appeals did petitioner contend that there was any violation of the Anti-Deficiency Act and the Court of Appeals, like the district court before it, never considered that question.

Under these circumstances—where the question has never been pleaded, briefed, or argued to the lower courts—this Court will not agree to consider it for the first time. *See, e.g., Kosak* v. *United States*, 465 U.S. 848, 850 n.3 (1984) (where "petitioner did not present this argument to the Court of Appeals, we decline to consider it."). The Court has consistently declined to consider questions not properly presented in the pleadings. *See, e.g., Virginian Railway Co.* v. *Mullens*, 271 U.S. 220, 227-228 (1926), where the Court refused to consider plaintiff's eleventh-hour effort to base liability on a new legal theory. "The case stated in the complaint was distinctly in tort. There was no mention of a contract obligation. . . . After bringing and trying the case on that theory the plaintiff cannot be permitted on this review to change to another which the defendant was not required to meet below." That is, of course, precisely what petitioner seeks to do in this case. *See also McGrath* v. *Manufacturers Trust Co.*, 338 U.S. 241, 249-50 (1949).

The Court has long refused to consider issues raised for the first time in a petition for certiorari. *See, e.g., United States* v. *Ortiz*, 422 U.S. 891, 898 (1975); *Helvering* v. *Minnesota Tea Co.*, 296 U.S. 378, 380 (1935); *White River Lumber Co.* v. *Arkansas*, 279 U.S. 692, 700 (1929); *Edward Hines Yellow Pine Trustees* v. *Martin*, 268 U.S. 458, 465 (1925) ("This court is a court of review, and it will not consider questions not raised or disclosed by the record brought to it for a review and which were not considered by the courts below.").

The Court's reasoning in *Miree* v. *DeKalb County*, 433 U.S. 25, 33-34 (1977), where it declined to consider plaintiffs' last-minute attempt to assert a private claim based on alleged violations of the Airport and Airway Development Act of 1970, is particularly applicable here. The Court noted that the complaints in *Miree* "sought recovery solely on the grounds of negligence, nuisance, and breach of contract. There is no indication that petitioners alleged a violation of a federal statute and a right to recovery for such a violation. The fact that this asserted basis of liability is so obviously an afterthought may be some indication of its merit, but since it was neither pleaded, argued, nor briefed either in the district court or in the Court of Appeals, we will not consider it."

### B. *There Is No Basis for Implying a Private Right of Action Under the Anti-Deficiency Act.*

Had the courts below considered petitioner's claim under the Anti-Deficiency Act, they would have been required to decide whether that Act applies to private parties or provides for a private right of action in the circumstances presented here. By its terms, the Act applies only to officers and employees of the United States and District of Columbia governments. 31 U.S.C. § 1341 (1986). It is a criminal statute, and provides that violations are punishable by fines of up to $5,000, imprisonment of up to two years, or both. 31 U.S.C. § 1350 (1986). Nothing in the statute expressly provides for a

private right of action, and petitioner would therefore be required to establish that such a right could be implied under this Court's decisions. There are no decisions that support such an implication.

This Court has set forth on several occasions the tests that are to be applied in determining whether a federal statute implies a private civil right of action. *See, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 378-95 (1982) (private right of action exists under Commodity Exchange Act); *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 23-24 (1979) (limited private right of action under Investment Advisers Act of 1940); *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 575-76 (1979) (no private right of action under Section 17(a) of Securities Exchange Act of 1934); *Cannon* v. *University of Chicago*, 441 U.S. 677, 688-717 (1979) (private right of action exists under Title IX of Education Amendments of 1972); *Cort* v. *Ash*, 422 U.S. 66, 78-85 (1975) (no private right of action to enforce limitation on corporate campaign contributions.)

The Court has emphasized in these cases that "the fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person." *Cannon*, 441 U.S. at 688. In *Cort* v. *Ash*, 422 U.S. at 78, the Court set forth four factors to be considered in deciding whether to imply a private right of action.

> "First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted,'. . .—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one?. . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?. . . And finally, is the cause of action one traditionally relegated to state law, in an area basically

> the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?" (citations omitted) (emphasis in original).

Since then, the Court has refined its analysis to focus primarily on the first three factors, recognizing that "(t]he central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action." *Touche Ross*, 442 U.S. at 575.

Simply put, petitioner has made no showing—nor could one be made on this record—that he is entitled to bring a private civil action to enforce the Anti-Deficiency Act, even assuming that violations of that Act took place.[7] As in *Cort* v. *Ash*, this case at most presents "nothing more than a bare criminal statute, with absolutely no indication that civil enforcement of any kind was available to anyone." 422 U.S. at 79-80. There is no indication that the statute was intended to benefit petitioner or that Congress intended civil suits to supplement the criminal enforcement procedures that it established. As the Court observed in *Touche Ross*, "when Congress wished to provide a private damage remedy, it knew how to do so and did so expressly." 442 U.S. at 572. Congress has plainly not done so, and this Court should not reach to decide that question in this case.

## II. The Court Should Not Engage in Further Fact Finding Concerning the Timeliness of Petitioner's Claims.

Inasmuch as the decision below in favor of Covington & Burling independently rested on settled principles of collateral estoppel, which are not challenged by petitioner, the issue of when petitioner's claim accrued for statute of limitations pur-

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[7] It is not without significance that Congress amended the Anti-Deficiency Act in 1982 without providing for such a private right of action, even though it may be presumed that Congress was well aware of this Court's holdings on the implication of rights of action. *See* Pub. L. 97-258, 96 Stat. 923.

poses is irrelevant. In any event, the question of accrual is a purely factual one on which both the district court and the Court of Appeals have twice ruled. In both cases, the lower courts were unanimous in finding that petitioner's claims are untimely. This Court has already denied review on the application of the four year statute of limitations to petitioner's antitrust claims. 470 U.S. 1056 (1985).

Based on this Court's holding in *Agency Holding Corp.* v. *Malley-Duff & Associates*, 483 U.S. 143 (1987), the identical four-year statute of limitations applies to both antitrust and RICO actions. This case therefore does not present the issue of *what* statute of limitations is appropriate in the context of civil RICO. Rather, it presents the purely factual question of when petitioner's RICO claims accrued so as to start the statute of limitations running. Petitioner contends, without support, that so long as the effects of the alleged RICO violation continue, his time in which to bring suit is tolled indefinitely. (*See, e.g.*, Pet. at 26-27.)

In the prior antitrust action, the First Circuit found that petitioner had failed to identify any overt act subsequent to the 1972 court-approved sale. (743 F.2d at 55; App. A-21-22.) Petitioner still has not identified a single act by any respondent that occurred within four years of the filing of the complaint. Petitioner continues to assert that his action was concealed from him notwithstanding the First Circuit's findings to the contrary. (743 F.2d at 56; App. A-23-25.) And given the intensity with which petitioner has litigated for more than 15 years, his claims of concealment are simply not credible.

The Court of Appeals carefully considered petitioner's extensive submissions and focused in particular on those allegations that were more recent in time. It found, after a full review of the record, that petitioner was well aware of his alleged cause of action long before September, 1982.

"The allegedly false affidavit of Laurence Johnson submitted by Palmer and Dodge on Del Monte's behalf was filed on or about August 1, 1979, and the allegedly false interrogatories filed by Palmer and Dodge on Del Monte's behalf were filed on June 18, 1981. Furthermore, plaintiff asserts in his brief on appeal that by November 25, 1981 he noticed that the district judge in the prior federal action had turned against him as part of a conspiracy involving Palmer and Dodge, Goodwin, Procter, and Hoar and their clients. Accordingly, we hold that plaintiff's claims under RICO accrued before September 25, 1982 and are therefore time-barred even under *Agency Holding Corp., supra*, 107 S. Ct. 2759." (First Circuit opinion at 4-5; App. A-18.) (citations omitted).

The determination of when this petitioner's action accrued is strictly a factual one without precedential significance. It presents no issue worthy of review by this Court.

**Conclusion**

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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February 6, 1989

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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Civil Action No. 86-2775-N

HERBERT D. BERKSON,

PLAINTIFF,

*v.*

DEL MONTE CORPORATION, ET AL.,

DEFENDANTS.

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# REPORT AND RECOMMENDATION ON DEFENDANTS MOTIONS TO DISMISS OR, IN THE ALTERNATIVE, MOTIONS FOR SUMMARY JUDGMENT

April 23, 1987

COHEN, M.

Plaintiff, Herbert D. Berkson, commenced this action on September 25, 1986. This represents his second trip to this court, and third trip to federal courts, complaining about matters attendant to the divestiture of the United Fruit Company. Although primarily based on the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §1961 *et seq.*, plaintiff's complaint includes claims for common law fraud, intentional interference with contractual and business relations, breach of fiduciary duty, and disclosure of "confidential business and proprietary information belonging to plaintiff in connection with the purchase of the divestiture properties of the United Fruit Company, now United Brands. . . in Guatemala, Central America." Plaintiff's Complaint §1. Also mentioned in the body of the complaint are claims for violations of the Sherman and Clayton Acts, the

Securities Exchange Act of 1934, 15 U.S.C. §78n(e), and various criminal statutes not part of RICO.[1]

Plaintiff has named as defendants Del Monte Corp., United Brands Co., Price Waterhouse, Palmer & Dodge, Goodwin, Procter & Hoar, Pillsbury, Madison & Sutro, Covington & Burling, William P. Rogers, Henry A. Kissinger and Nathaniel Davis.

All defendants have moved to dismiss plaintiff's complaint, or in the alternative for summary judgment, based on res judicata, collateral estoppel, statute of limitations, failure to state a claim upon which relief can be granted and immunity.

## I. *BACKGROUND*

In 1954, the United States commenced an action in Louisiana federal court against United Fruits (the predecessor of United Brands) for violations of the Sherman Act. In 1958, a consent decree was entered into by the parties. Article VIII of the decree required United Brands to divest itself of part of its banana producing properties.

In 1970, properties in Guatemala were approved for sale by the Louisiana court and United Brands entered into negotiations with Del Monte for the purchase of the properties. However, in 1971, the Guatemalan government disapproved Del Monte as a buyer and indicated that it would prefer to deal with Guatemalan nationals. In 1972, Del Monte successfully resumed its efforts to purchase the properties;

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[1] These criminal statutes—18 U.S.C. §§371, 1621, 1622, 1623, 1005, 1546 and 2071—are not predicate offenses within the meaning of RICO's definitions of "racketeering activity." *See* 18 U.S.C. §1961(1). As a result, they cannot form the bases of a RICO claim. *See United States* v. *Pepe*, 747 F.2d 632, 645 (11th Cir. 1984). Nor do purely criminal statutes provide a private right of action to a civil litigant such as plaintiff. *See, e.g., Dugar* v. *Coughlin*, 613 F. Supp. 849, 852 n. 1 (S.D.N.Y. 1985) (no private right of action under 18 U.S.C. §371); *Fiorino* v. *Turner*, 476 F. Supp. 962, 963 (D. Mass. 1979) (same); *Weiland* v. *Byrne*, 392 F. Supp. 21, 22 (N.D. Ill. 1975) (private litigant does not have standing under 18 U.S.C. §1621).

Guatemala approved Del Monte as a purchaser and the sale was confirmed by the Lousiana court. The divestiture occurred on December 14, 1972.

According to plaintiff, he and a Guatemalan, Julian Presa, had formed an enterprise, the Pan Tropic Fruit Company, to purchase the divestiture properties. Plaintiff appeared as *amicus curiae* at the hearing before the Louisiana court to oppose the sale of the properties to Del Monte. He has been challenging the results of the divestiture ever since.

In November 1974, plaintiff filed an action in Massachusetts state court against United Fruit and Eli M. Black, United's then chairman. Plaintiff alleged that United Fruit and Black had breached an oral contract to sell to him the divestiture properties. This suit was dismissed by the state court, as was plaintiff's appeal to the Massachusetts Appeals Court.

Shortly after the dismissal of his appeal in June, 1979, plaintiff commenced an action in this Court, Civil Action No. 79-1180-T. Plaintiff named as defendants Del Monte and United Brands; he alleged that they violated the federal antitrust laws by excluding companies other than Del Monte from purchasing United Brands' Guatemala properties, by undermining plaintiff's efforts to purchase the properties, by refusing to divulge information and divulging false information concerning the properties, by using bribery and political pressure to obtain Guatemalan approval of Del Monte as the purchaser, and by withholding information from the Louisiana federal court in 1972.

In March, 1983, United Brands and Del Monte moved for summary judgment. In July, 1983, after submission of briefs and oral argument, Magistrate DeGiacomo recommended that defendants' motions be granted. He found that plaintiff's action was time-barred, that plaintiff lacked standing under the Clayton Act, that the Act of State Doctrine barred plaintiff's action and that plaintiff's suit was an impermissible collateral attack on the consent decree and judgment of the

Louisiana federal court. The District Court approved the Magistrate's recommendation and granted defendants' motions for summary judgment in August, 1983.

Plaintiff appealed to the United States Court of Appeals for the First Circuit. On September 17, 1984, the First Circuit affirmed the District Court's grant of summary judgment on the ground that the action was time-barred. *Berkson* v. *Del Monte Corp.*, 743 F.2d 53 (1st Cir. 1984). Plaintiff petitioned the United States Supreme Court for *certiorari*. The petition was denied in March, 1985. 105 S.Ct. 1765 (1985). Plaintiff thereafter filed the instant action.

II. *DISCUSSION*

*A. Summary Judgment Standard*[2]

"Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp.* v. *Catrett*, 106 S.Ct. 2548, 2555 (1986) (quoting Fed. R. Civ. P. 1). To survive defendants' motions for summary judgment, plaintiff must demonstrate that there is a genuine issue of material fact requiring a trial. Fed. R. Civ. P. 56(e); *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 106 S.Ct. 1348, 1355-56 (1986). As the Supreme Court recently has made clear, the standard for granting summary judgment "mirrors" the standard for a directed verdict under Fed. R. Civ. P. 50(a). *Anderson* v. *Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2511 (1986). That is, the inquiry focuses on "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 2512. "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue

[2] Because papers outside the pleadings have been considered, this court will treat the instant motions as motions for summary judgment. Fed. R. Civ. P. 12(b).

for trial.'" *Matsushita*, 106 S.Ct. at 1356 (citing *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 289 (1968)).

In determining defendants' motion for summary judgment, this court must view the evidence and all inferences in the light most favorable to the party opposing the motion. *Hahn* v. *Sargent*, 523 F.2d 461, 464 (1st Cir. 1975) (citations omitted), *cert. denied*, 425 U.S. 904 (1976). However, plaintiff may not obtain a trial merely on the allegations in his complaint, *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 289-90 (1968), or by showing that there is "some metaphysical doubt as to the material facts," *Matsushita, supra*, 106 S.Ct. at 1356 (citations omitted). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson*, 106 S.Ct. at 2510.

Plaintiff's complaint can be read to concern two distinct sets of events. First are his allegations that the 1972 method of divestiture and the incidents surrounding it violated RICO, other laws, and common law rights belonging to plaintiff. Second, plaintiff complains about the defendants' actions during the prior federal suit in this court. Because different legal standards apply to each of these claims, this court will address each separately.

B. *Claims Based on the 1972 Divestiture*

1. United Brands and Del Monte

United Brands and Del Monte, the two defendants in the prior federal action, claim that plaintiff's RICO claims against them are barred by the doctrine of *res judicata*, or claim preclusion. That conclusion is inescapable in the circumstances.

Under this doctrine, "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action."

*Allen* v. *McCurry*, 449 U.S. 90, 94 (1980). A grant of summary judgment is a judgment on the merits. *See Rose* v. *Town of Harwich*, 778 F.2d 77 (1st Cir. 1985), *cert. denied*, 106 S.Ct. 2278 (1986); *Isaac* v. *Schwartz*, 706 F.2d 15, 17 (1st Cir. 1983) (dismissal for failure to state a claim under Rule 12(b)(6) is a judgment on the merits); 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice*, ¶0.409 [1.-2] (1984) (judgment on motion for summary judgment is on the merits).

The bar of res judicata, however, is limited to cases arising out of the same claim or cause of action. *Manego* v. *Orleans Board of Trade*, 773 F.2d 1, 5 (1st Cir. 1985), *cert. denied*, 106 S.Ct. 1466 (1986). This circuit has adopted the approach of §24 of the *Restatement (Second) of Judgments* in determining when two cases concern the same claim. *Id.*

> § 24. Dimensions of "Claim" for Purposes of Merger or Bar—General Rule Concerning "Splitting"
>
> (1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar. . . . , the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.
>
> (2) What factual grouping constitutes a "transaction", and what groupings constitute a "series", are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

*Restatement (Second) Judgments* §24 (1982).

Plaintiff cannot avoid res judicata by pleading different legal theories or by adding new defendants. *Manego*, 773 F.2d at 6; *Restatement*, §24, comm. c., §25, comm. d. As the comments to §24 point out:

> That a number of different legal theories casting liability on an actor may apply to a given episode does not create multiple transactions and hence multiple claims. This remains true although the several legal theories depend on different shadings of the facts, or would emphasize different elements of the facts, or would call for different measures of liability or different kinds of relief.

§24, comm. c. Similarly, when a judgment is on statute of limitations grounds, as in plaintiff's prior suit, the bar is not avoided by shifting the legal theory on which the claim is pitched. *Moore's Federal Practice*, ¶0.409[6]. If the transaction underlying the two suits is the same, res judicata is a bar to the second suit.

There is no doubt that the underlying facts of the RICO claim are precisely the same as the facts underlying the antitrust claim. Plaintiff's first complaint concerned alleged violations of the antitrust laws based on the 1958 consent decree and 1972 divestiture of the Guatemalan banana properties. His second complaint involves the same occurrences, but alleges that the divestiture and those who took part in it violated RICO. This court has carefully reviewed plaintiff's pleadings in this case and is unable to find any factual allegations indicating that plaintiff's current action grows out of a different transaction than that alleged in his first suit.

Widening the alleged conspiracy to include government officials and law firms does not change this result; the fact is that the actions of the new defendants which are alleged to violate RICO are the same actions about which plaintiff has complained in the prior suit. Plaintiff adds little that is different in this action and any minor differences that he does allege do not transform his second suit into a new cause of action. *See Manego*, 773 F.2d at 6. Res judicata, then, bars all of plaintiff's claims which concern the 1972 divestiture.[3]

[3] Plaintiff argues that, because none of the defendants had been convicted under RICO, he could not have brought his RICO suit until 1985 when the

2. The Remaining Defendants

The remaining defendants, not parties to the prior suit, also argue that *res judicata* bars this present RICO action against them. Although there is some support for the position that strangers to the first action may claim the effects of *res judicata*,[4] that is not the law, except in limited circumstances, in this circuit.[5]

In *Manego* v. *Orleans Board of Trade*, the First Circuit Court of Appeals affirmed the trial court's decision that *res judicata* did not apply to a defendant which was not a party to the prior suit. 773 F.2d at 7, *affirming* 598 F. Supp. 231, 235 (D. Mass. 1984); *see also Valentin* v. *United States Postal Service*, 787 F.2d 748, 750 and n. 1 (1st Cir. 1986) (res judicata available only to "parties or their privies"); *Sierra Club* v. *Secretary of Transportation*, 779 F.2d 776, 779 (1st Cir. 1985)

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United States Supreme Court resolved a conflict among the Circuit and district courts. *See Sedima, S.P.R.L.* v. *Imrex Co.*, 105 S.Ct. 3275 (1985) (holding that a RICO private treble damages action may be brought even though defendants have not been criminally convicted of a predicate act under RICO). Plaintiff seeks far too much from far too little. The mere fact that a conflict existed does not excuse a litigant from asserting all claims. The very existence of a conflict indicates that the claim was not frivolous, and plaintiff's choice not to pursue a RICO claim at that time is not a valid defense to the doctrine of *res judicata*.

[4] Permitting "nonmutual claim preclusion" would be attractive in this case which reflects "no more than a last desperate effort by a plaintiff who is pursuing a thin claim against defendants who were omitted from the first action because they were less directly involved than the original defendants." 18 C. Wright, W. Miller & E. Cooper, *Federal Practice and Procedure*, §4464, at 588-89 (1981). Professors Wright, Miller and Cooper suggest a limited rule that would permit nonmutual claim preclusion only when the new defendant can show why he should have been joined in the first suit and plaintiff cannot show any good reasons justifying a second chance. *Id.* at 589. This, however, is not the law of this circuit.

[5] Defendants seemingly argue that the fact that a claim may be the same for *res judicata* purposes even if new defendants are present in the second suit means that those new defendants may also claim the bar of *res judicata*. Section 24's test, however, is only aimed at determining when the same transactions underly two claims once the prerequisites to res judicata already apply, namely, identity of parties.

(basic prerequisites of res judicata are finality of judgment, *identity of parties* and identity of claim).

The First Circuit cases on which defendants rely exemplify the limited exceptions to the mutuality requirement and are not applicable in this case. For example, in *Capraro* v. *Tilcon Gammino, Inc.*, 751 F.2d 56 (1st Cir. 1985), the court held that the parent of a wholly-owned subsidiary could take advantage of *res judicata*, even though only its subsidiary was a defendant in the first suit. *Id.* at 59 (citing §59(3) of the *Restatement (Second) of Judgments*, which specifically concerns holders of ownership in corporations). The court held that under the requirements of §59(3), the subsidiary had acted at the direction of its parent. *Id.*

Another exception to the rule that there must be identity of parties appears in *Mashpee Tribe* v. *Watt*, 707 F.2d 23 (1st Cir.), *cert. denied*, 464 U.S. 1020 (1983). The claims in *Mashpee Tribe* concerned title to land. When property rights are at stake, new defendants may claim the bar of res judicata. *Id.* at 24-25 (citing *Restatement (Second) of Judgments* §§25, 43 comm. c.).

Notwithstanding these limitations, however, defendants may assert the benefits of collateral estoppel, or issue preclusion, on at least those claims of plaintiff involving the 1972 divestiture. *See Manego*, 598 F. Supp. at 236 (stranger to first action may defensively assert principles of issue preclusion) (citing *Parklane Hosiery* v. *Shore*, 439 U.S. 322 (1979)). Collateral estoppel applies when an issue of fact or law is actually litigated and determined by a final judgment and the determination is essential to the judgment. *Restatement (Second) Judgments* §27; *Manego*, 598 F. Supp. at 236.

The Court of Appeals in *Berkson* v. *Del Monte Corp.* concluded that plaintiff's antitrust claim based on the 1972 divestiture arose no later than December, 1972, and that there was no fraudulent concealment of this claim. 743 F.2d at 55-57. Despite plaintiff's arguments to the contrary, there is

no doubt that he had a full and fair opportunity to litigate these issues; when issues are submitted and determined on motions for summary judgment such issues have been "actually litigated." *Restatement*, §27, comm. d. Also, the factual determinations regarding the bar of the statute of limitations were necessary to the judgment of the Court of Appeals in the prior suit as they were the bases for the affirmance of the district court's grant of summary judgment. *See Berkson* v. *Del Monte Corp.*, 743 F.2d at 57.

Plaintiff's prior suit was based on antitrust law. The instant suit is premised on alleged RICO violations. However, the change in legal theory cannot disguise the fact that plaintiff's two causes of action are grounded on the same transaction—the 1972 divestiture. Plaintiff alleges no new facts regarding the events surrounding the sale of United Brands' Guatemalan banana properties. Thus, the issue of when the antitrust claim arose is identical to the issue of when the RICO claim arose. Both arose by December, 1972. *Cf. Wilson* v. *Retail Credit Co.*, 474 F.2d 1260, 1261 & n. 2 (5th Cir. 1973) (finding that statute of limitations barred plaintiff's libel claim is entitled to collateral estoppel where same facts underly plaintiff's new cause of action based on different legal theory).

That plaintiff's RICO claim is time-barred is obvious.[6] Plaintiff attempts to avoid the statute of limitations, as he did in the prior suit, by alleging fraudulent concealment. He asserts that it was only during the discovery process of the prior suit that he learned of the facts on which his RICO claims are premised. Complaint ¶16. Without specifying what these facts are, he broadly alleges that after commencing his action, he discovered that the government agencies involved in the divestiture were not "faithfully executing the laws of the United States." *Id.*

However, the Court of Appeals found that Berkson did not use due diligence in discovering the facts underlying his anti-

[6] This is so no matter what statute of limitations applies. *See infra.*

trust cause of action and, thus, that he did not meet the requirements to invoke the doctrine of fraudulent concealment. 734 F.2d at 56-57. Because the *facts* on which both claims are premised are identical, the finding of lack of due diligence precludes plaintiff from relitigating whether any of these new defendants fraudulently concealed his RICO claim.

Plaintiff already has had his one bite at the apple to litigate the statute of limitations issues; he is not entitled to yet another. As the United States Supreme Court has made clear:

> Permitting repeated litigation of the same issue as long as the supply of unrelated defendants holds out reflects either the aura of the gaming table or "a lack of discipline and of disinterestedness on the part of the lower courts, hardly a worthy or wise basis for fashioning rules of procedure." *Kerotest Mfg. Co.* v. *C-O-Two Co.*, 342 U.S. 180, 185 (1952).

*Blonder-Tongue Laboratories, Inc.* v. *University of Illionois Foundation*, 402 U.S. 313, 329 (1971). Moreover, collateral estoppel acts to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." *Allen* v. *McCurry*, 449 U.S. 90, 94 (1980). This case readily invites—indeed, demands—application of these principles. All of plaintiff's claims based on the 1972 divestiture are time-barred as to these new defendants as well.

C. *Claims Based on Events in the Prior Federal Action*

In his complaint, plaintiff charges that some defendants acted improperly in the prior federal action. Specifically, plaintiff claims that Palmer & Dodge and Goodwin, Procter & Hoar (attorneys for Del Monte and United Brands respectively) misled the court about the facts, "blinded" the court, aided the court in "expunging" a document from court records, influenced the decision of Magistrate DeGiacomo and

wrote the Magistrate's decision for him.[7] Plaintiff additionally charges Palmer & Dodge with refusing to correct, in open court, an incorrect answer to an interrogatory,[8] and with filing false affidavits. Similarly, plaintiff asserts that Del Monte filed false affidavits.

To the extent that these claims are alleged to violate RICO, they are barred by the applicable statute of limitations.

Because RICO contains no limitations period, this court must apply the most analogous state statute of limitations. *Wilson* v. *Garcia*, 471 U.S. 261 (1985). Under the test announced in *Garcia*, courts first must decide whether all causes of action under a particular federal statute should be characterized in the same way for limitations purposes, or whether individual determinations should be made based upon the underlying fact patterns in each case. *Id.* at 271-75. Courts that have addressed this issue in the context of RICO have reached opposite conclusions. *Compare Malley-Duff & Associates, Inc.* v. *Crown Life Insurance Co.*, 792 F.2d 341, 349, 352-53 (3d Cir. 1986) (court must choose *one* analogous state statute of limitations for all RICO claims; court chose state's catchall limitations statute for claims based on statute), *cert. granted*, 107 S.Ct. 569 (1987), with *Silverberg* v. *Thomson McKinnon Securities, Inc.*, 787 F.2d 1079, 1083 (6th Cir. 1986) (court must look to characterization of underlying facts in particular cases to determine analogous state statute of limitations; court chose limitations period for common law fraud).

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[7] It is not insignificant, of course, that the judgment in the prior litigation was entered by the district judge—not the magistrate—and affirmed by the United States Court of Appeals.

Plaintiff also asserts that Pillsbury, Madison & Sutro and Covington & Burling misled the court in the prior action. As there is no evidence that these two law firms were involved in the prior federal suit, it is difficult to see to what plaintiff is referring. To the extent plaintiff is complaining about actions that took place before the Louisiana federal district court in the early 1970s, his claim clearly is time-barred. *See* Part IIB, *supra*.

[8] In the answer, Del Monte gave the name of a bank incorrectly. The proper name was City National Bank; the answer to the interrogatory identified the bank as the First National Bank of Miami.

Because Massachusetts does not have a limitations period specifically applicable to statutory causes of action, the most analogous statute of limitations under either prong of the test, is the three year limitations period contained in M.G.L. c. 260, §2A.[9] Thus, plaintiff's cause of action is barred if it accrued prior to September 25, 1983.

The actions about which plaintiff complains specifically concern the issuance of Magistrate DeGiacomo's Report and Recommendation in July 1983. At the latest, plaintiff should have been aware of his cause of action by August 1983, when the district judge approved the magistrate's report, and entered judgment thereon, and plaintiff offers nothing to indicate that he was not, or was prevented from being, so aware.

Based on the foregoing, then, plaintiff's RICO claims based on defendants' alleged actions in the prior suit are likewise barred by the statute of limitations.

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[9] M.G.L. c. 260, §2A provides:

> §2A. Three years; actions of tort, contract to recover for personal injuries and replevin
>
> Except as otherwise provided, actions of tort, actions of contract to recover for personal injuries, and actions of replevin, shall be commenced only within three years next after the cause of action accrues.

Although no court within the First Circuit has appeared to have decided this precise question, the court in *UST Capital Corp.* v. *Charter Nat'l Life Insurance Co.*, No. 77-21-Z, slip. op. (D.Mass. 1986), agreed with the parties that §2A governed in a RICO action based on fraud. Here, also, plaintiff's allegations concerning the defendant's actions in the prior suit most resemble claims that the defendants perpetrated a fraud upon the court.

III. *CONCLUSION*

For the reasons set forth above, this Court accordingly recommends[10] that defendants' various motions for summary judgment be allowed, and that judgment accordingly enter for the defendants.

s/ LAWRENCE P. COHEN
*United States Magistrate*

[10] The parties are hereby advised that under the provisions of Rule 3(b) of the Rules for United States Magistrates in the United States District Court for the Distrtict of Massachusetts, any party who objects to these proposed findings and recommendations must file a written objection thereto with the Clerk of this Court within 10 days of the party's receipt of this Report and Recommendation. The written objections must specifically identify the portion of the proposed findings, recommendations, or report to which objection is made and the basis for such objections. The parties are further advised that the United States Court of Appeals for this Circuit has indicated that failure to comply with this rule shall preclude further appellate review. See *United States* v. *Emiliano Valencia-Copete*, 792 F.2d 4 (1st Cir. 1986); *Park Motor Mart, Inc.* v. *Ford Motor Co.*, 616 F 2d 603 (1st Cir. 1980); *United States* v. *Vega*, 678 F.2d 376, 378-379 (1st Cir. 1982); *Scott* v. *Schweiker*, 702 F.2d 13, 14 (1st Cir. 1983); see also, *Thomas* v. *Arn*, __ U.S. __, 106 S.Ct. 466 (1985).

AO 450 (Rev.5/85) Judgment in a Civil Case

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CASE NUMBER CA 86-2775-N

HERBERT D. BERKSON

*v.*

DEL MONTE CORPORATION, ET AL.

JUDGMENT IN A CIVIL CASE

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** The Court having accepted the recommendation of Magistrate Cohen, and having adopted same,

IT IS ORDERED AND ADJUDGED

JUDGEMENT FOR DEFENDANTS.

May 29, 1987 GEORGE F. MCGRATH, *Clerk*

(By) /s/ (ILLEGIBLE), *Deputy Clerk*

[NOT FOR PUBLICATION]

# United States Court of Appeals
## For the First Circuit

No. 87-1539

HERBERT D. BERKSON,

PLAINTIFF, APPELLANT,

*v.*

DEL MONTE CORPORATION, ET AL.,

DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. DAVID S. NELSON, *U.S. District Judge*]

Before
CAMPBELL, *Chief Judge*,
COFFIN AND SELYA, *Circuit Judges*.

*Herbert D. Berkson* on brief pro se.

*Craig E. Stewart*, *John T. Harding, Jr.* and *Palmer & Dodge* on brief for appellees, Palmer & Dodge and Pillsbury, Madison & Sutro.

*Thomas J. Griffin, Jr.* and *Goodwin, Procter & Hoar* on brief for appellee Goodwin, Procter & Hoar.

*Thomas J. Griffin, Jr.*, *Richard A. Oetheimer*, *Gordon H. Piper* and *Goodwin, Procter & Hoar* on brief for appellee United Brands Company.

*Christine M. Roach*, Assistant U.S. Attorney and *Frank L. McNamara, Jr.*, Acting United States Attorney, on brief for appellees Henry A. Kissinger, William P. Rogers and Nathaniel Davis.

*Jennifer A. Kemp*, *Jeffrey B. Rudman* and *Hale and Dorr* on brief for appellee Price Waterhouse.

*Jack R. Pirozzolo*, *Richard L. Binder*, *Willcox, Pirozzolo & McCarthy, Professional Corporation* on brief for appellee Covington & Burling.

*Paul B. Galvani* and *Ropes & Gray* on brief for appellee Del Monte Corporation.

June 29, 1988

PER CURIAM. The judgment of the district court is affirmed substantially for the reasons stated in the magistrate's report and recommendation adopted by the district court.

The magistrate found that plaintiff Herbert Berkson's claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*, against all defendants were time-barred (whereas principles of res judicata were found to preclude Berkson's claims only against those defendants who were parties to plaintiff's prior federal suit, *Berkson* v. *Del Monte Corp.*, 743 F.2d 53 (1st Cir. 1984), *cert. denied*, 470 U.S. 1056 (1985) ).

In so finding, the magistrate applied the three-year limitations period for Massachusetts tort actions contained in Mass. Gen. Laws c. 260, § 2A, as the statute of limitations governing plaintiff's RICO claims. Plaintiff's complaint having been filed on September 25, 1986, the magistrate found that plaintiff's claims were barred if they accrued before September 25, 1983. Accordingly, plaintiff's claims based on defendants' alleged misdeeds in the course of plaintiff's prior federal action were held time-barred because all these claims accrued by August 1983, when the district court entered judgment against plaintiff on the basis of the magistrate's report and recommendation. Plaintiff's other claims based on the 1972 divestiture of United Brands were held time-barred because they arose no later than 1972 and because principles of collateral estoppel bound plaintiff to the determination in the prior federal action that there had been no fraudulent concealment of these claims.

After the district court's judgment the Supreme Court ruled in *Agency Holding Corp.* v. *Malley-Duff & Associates, Inc.*, 107 S. Ct. 2759 (1987), that the four-year statute of limitations governing Clayton Act civil enforcement actions, 15 U.S.C. § 15b, constituted the applicable limitations period for civil

RICO actions. Thus, plaintiff's claims are time-barred if they accrued before September 25, 1982, not the September 25, 1983 date applied by the magistrate.

Obviously, this adjustment does not affect plaintiff's claims based on the 1972 divestiture. Those claims remain long time-barred under the new standard.

Nor does application of the four-year limitations period revive, as timely, any of plaintiff's RICO claims based on events in the prior federal action. A cause of action under RICO accrues when "a plaintiff knows or should know of the injury" which forms the basis of the plaintiff's action. *Bowling* v. *Founders Tile Co.*, 773 F.2d 1175, 1178 (11th Cir. 1985), *cert. denied*, 475 U.S. 1109 (1986). Plaintiff's RICO claims against each defendant accrued when he was first injured by that defendant's alleged acts, not when the last predicate act for a RICO claim occurred. *Id.* The allegedly false affidavit of Laurence Johnson submitted by Palmer and Dodge on Del Monte's behalf was filed on or about August 1, 1979, and the allegedly false interrogatories filed by Palmer and Dodge on Del Monte's behalf were filed on June 18, 1981. Furthermore, plaintiff asserts in his brief on appeal that by November 25, 1981 he noticed that the district judge in the prior federal action had turned against him as part of a conspiracy involving Palmer and Dodge, Goodwin, Procter, and Hoar,[1] and their clients. Accordingly, we hold that plaintiff's claims under RICO accrued before September 25, 1982 and are therefore time-barred even under *Agency Holding Corp.*, *supra*, 107 S. Ct. 2759.

Plaintiff also purported to bring claims under the Securities Exchange Act of 1934, 15 U.S.C. § 78n(e). Claims brought under that section, which does not itself specifically provide for a limitations period, are subject to the most closely analogous statute of limitations of the forum state, i.e., the statute of limitations for common law fraud actions. *Stull* v. *Bayard*, 561 F.2d 429, 431 (2d Cir. 1977), *cert. denied*, 434

U.S. 1035 (1978). *See Cook* v. *Avien, Inc.*, 573 F.2d 685, 694 (1st Cir. 1978); *Janigan* v. *Taylor*, 344 F.2d 781, 783 (1st Cir.), *cert. denied*, 382 U.S. 879 (1965). In Massachusetts the limitations period for tort and fraud actions is three years. Mass. Gen. Laws c. 260, § 2A. Accordingly, any securities claim plaintiff might assert is barred if it accrued before September 25, 1983. However, plaintiff's securities claims are based on his allegation that defendant Price Waterhouse wrongfully approved defendant Del Monte Corp.'s 1972 payment of $500,000—characterized by plaintiff as a bribe—to a foreign consultant in connection with the 1972 divestiture. Not only did this payment occur fourteen years before plaintiff filed his complaint, but plaintiff's complaint concedes that the "bribe" was reported in a 1975 article in the *Wall Street Journal*. Plaintiff's securities claims under 15 U.S.C. § 78n are, accordingly, time-barred.

Insofar as plaintiff purports to bring a variety of common law tort claims (governed by the three-year statute of limitations of Mass. Gen. Laws c. 260, § 2A) and claims under the Sherman and Clayton Acts (governed by the four-year statute of limitations of 15 U.S.C. § 15b), these claims are time-barred and/or precluded under principles of res judicata for the reasons stated in the magistrate's report and recommendation and in this opinion.

Defendant-appellee Covington & Burling's request for sanctions against plaintiff is denied.

The judgment of the district court is *affirmed*.

# United States Court of Appeals
## For the First Circuit

No. 83-1636

HERBERT D. BERKSON,
PLAINTIFF, APPELLANT,

*v.*

DEL MONTE CORPORATION, ET AL.,
DEFENDANTS, APPELLEES.

Before CAMPBELL, *Chief Judge*, BOWNES, *Circuit Judge*, and PEREZ-GIMENEZ,* *District Judge*.

*J. Sheffield Dow*, Boston, Mass., for plaintiff, appellant.

*Thomas J. Griffin, Jr.*, Boston, Mass., with whom *Richard A. Oetheimer*, *Gordon H. Piper*, and *Goodwin, Procter & Hoar*, Boston, Mass., were on brief, for defendant, appellee United Brands Co.

*Craig E. Stewart*, Boston, Mass., with whom *Erik D. Lazar*, *John T. Harding, Jr.*, and *Palmer & Dodge*, Boston, Mass., were on brief, for defendant, appellee Del Monte Corp.

ARGUED AUGUST 6, 1984.
DECIDED SEPT. 17, 1984.

BOWNES, *Circuit Judge*. Appellant Herbert Berkson brought this action under 15 U.S.C. §§1 and 2, alleging that appellees Del Monte and United Brands conspired together to prevent Berkson and his Pan Tropic Fruit Company from purchasing certain banana properties in Guatemala. The district court granted summary judgment on the ground, among others, that the action was time barred. We find this issue dispositive, and affirm.

* Of the District of Puerto Rico, sitting by designation.

Under a consent decree in *United States* v. *United Fruit Co.*, Civil No. 4560 (E.D. La. 1958), United Brands' predecessor, United Fruit, agreed to divest itself of some Central American banana properties. After an unsuccessful attempt to fulfill the decree by selling properties in Panama, United Fruit turned to the Guatemalan properties involved in this case. Bids were solicited; among the bidders were Del Monte and Pan Tropic. In the hope that a suitable mixed Guatemalan-American enterprise could be found, the Guatemalan Government initially refused to approve Del Monte as a potential purchaser in November, 1971. In October, 1972, however, the Guatemalan Government changed its position and approved the sale to Del Monte. The United States Department of Justice also approved. After a hearing before the United States District Court for the Eastern District of Louisiana at which Berkson appeared as *amicus curiae* opposing the transaction, the sale to Del Monte was consummated in December, 1972. In June, 1979, six and one-half years later, Berkson filed the complaint in this case.

In his complaint, Berkson charged Del Monte and United Brands with the following antitrust violations: conspiring to exclude companies other than Del Monte from purchasing the Guatemalan properties; refusing to divulge information, and divulging false information, to prospective purchasers other than Del Monte concerning the properties; undermining Berkson's sources of financial backing; using political pressure, intimidation, and bribery to drive away Berkson's Guatemalan associate and obtain approval of the sale to Del Monte from the Guatemalan Government; withholding information from the federal district court at the 1972 hearings; and maintaining a shared monopoly by excluding competitors from the banana growing and importing market. Although Berkson claims that the alleged violations have continuing effects in the United States, his complaint is based entirely on actions occurring before the consummation of the 1972 sale;

no subsequent overt act in furtherance of the alleged conspiracy is described or even hinted at. It is clear, therefore, that Berkson's cause of action accrued no later than December, 1972,[1] for the impact of events leading up to the sale became final at that time and any subsequent harm must be seen as the "unabated inertial consequence[ ]" of the earlier events. *See In re Multidistrict Vehicle Air Pollution*, 591 F.2d 68, 71-72 (9th Cir.), *cert. denied*, 444 U.S. 900, 100 S.Ct. 210, 62 L.Ed.2d 136 (1979); *Poster Exchange, Inc.* v. *National Screen Service Corp.*, 517 F.2d 117, 126-28 (5th Cir. 1975), *cert. denied*, 425 U.S. 971, 96 S.Ct. 2166, 48 L.Ed.2d 793 (1976).

On its face, the action is barred by the four-year statute of limitation. 15 U.S.C. § 15b. Berkson seeks to avoid the time bar on the only legal theory available to him, namely, by ascribing his failure to bring timely suit to fraudulent concealment on the part of Del Monte and United Brands. He argues that in 1972 he lacked the requisite factual basis for filing an antitrust complaint though his suspicions were already aroused, and that he only became aware of appellee's specific misconduct in July, 1975, through a *Wall Street Journal* article. To invoke the doctrine of fraudulent concealment, a plaintiff must plead and prove three elements: "(1) wrongful concealment of their actions by the defendants; (2) failure of the plaintiff to discover the operative facts that are the basis of his cause of action within the limitations period; and (3) plaintiff's due diligence until discovery of the facts." *Dayco Corp.* v. *Goodyear Tire & Rubber Co.*, 523 F.2d 389, 394 (6th Cir. 1975); *see also In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1169 (5th Cir. 1979), *cert. denied*, 449 U.S. 905, 101 S.Ct. 280, 66 L.Ed.2d 137 (1980); *Charlotte Telecasters*,

[1] The rule that a limitation period is tolled when damages are speculative or unascertainable, *see Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 339, 91 S.Ct. 795, 806, 28 L.Ed.2d 77 (1971), has no application here.

*Inc.* v. *Jefferson-Pilot Corp.*, 546 F.2d 570, 574 (4th Cir. 1976). The burden rests squarely on the party pleading fraudulent concealment. *Akron Presform Mold Co.* v. *McNeil Corp.*, 496 F.2d 230, 233 (6th Cir.), *cert. denied*, 419 U.S. 997, 95 S.Ct. 310, 42 L.Ed.2d 270 (1974).

In reviewing Berkson's voluminous submissions in opposition to the summary judgment motion,[2] we find no trace of any allegation, let alone a showing sufficient to raise a genuine issue of fact, concerning the first and third elements of fraudulent concealment. It is well established that

> the plaintiff must allege facts showing affirmative conduct on the part of the defendant which would, under the circumstances of the case, lead a reasonable person to believe that he did not have a claim for relief. Silence or passive conduct of the defendant is not deemed fraudulent, unless the relationship of the parties imposes a duty upon the defendant to make disclosure. The affirmative act of denying wrongdoing may constitute fraudulent concealment where the circumstances make the plaintiff's reliance upon the denial reasonable. . . .

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[2] In his opposition to the summary judgment motion and his accompanying affidavit, Berkson stated merely that he believed neither appellee was entitled to summary judgment; he failed to specify a single issue of material fact relevant to the statute of limitation issue. His attempt to incorporate by reference over 5,000 pages of pleadings, depositions, and discovery documents was blatantly improper under Fed. R. Civ. P. 56(e), which requires that affidavits be made on personal knowledge and set forth specific facts admissible in evidence to show that there is a genuine issue for trial. The district court would have been fully justified in disregarding Berkson's submissions for lack of authentication and failure to identify or organize relevant documents in a "reasonably intelligible manner." *See Zoslaw* v. *MCA Distributing Corp.*, 693 F.2d 870, 883 (9th Cir. 1982), *cert. denied*, 460 U.S. 1085, 103 S.Ct. 1777, 76 L.Ed.2d 349 (1983). We have nevertheless reviewed Berkson's own deposition testimony and other submissions, and have found nothing in them sufficient to raise an issue of fact as to fraudulent concealment.

*Rutledge* v. *Boston Woven Hose & Rubber Co.*, 576 F.2d 248, 250 (9th Cir. 1978). Although fraud in the sale of the banana properties underlies Berkson's complaint, there is no charge of affirmative conduct by the appellees intended to conceal the facts upon which Berkson based his complaint or to deceive him into believing that he did not have a cause of action. At most, Berkson has alleged that appellees have refused to divulge information to substantiate his earlier suspicions. *See Hall* v. *E. I. DuPont de Nemours & Co.*, 312 F.Supp. 358, 362 (E.D.N.Y. 1970) (conspiracy secret by nature, not per se sufficient to toll statute of limitation). Indeed, we note that Berkson voiced his suspicions and filed an *amicus curiae* brief before the United States District Court for the Eastern District of Louisiana in 1972, when he opposed the sale to Del Monte on grounds virtually identical to those advanced in the present case. In the absence of a fiduciary relationship between Berkson and appellees, we do not think that silence or refusal to cooperate on the part of Del Monte and United Brands rises to the level of fraudulent conduct.

Appellees argue that Berkson's appearance and submissions in Louisiana in 1972 establish as a matter of law that he had actual notice at that time of his cause of action, and that he cannot meet the second limb of the test for fraudulent concealment. Had the district court considered the claim on the merits, we would likely agree; on a motion for summary judgment, though, we hesitate to infer that Berkson knew of facts sufficient to support a claim in 1972. Nevertheless, we need not reach the question of how concrete or well founded a suspicion of misconduct must be to constitute notice of "the facts necessary to institute [a] suit," for even if Berkson's suspicions were purely conjectural in 1972 and became concrete only later, a "plea of ignorance" standing alone "is insufficient to avoid the statute [of limitation]." *Charlotte Telecasters*, 546 F.2d at 574; *Akron Presform*, 496 F.2d at 234.

If Berkson wished to bring an action based on his suspicions, he was under a duty to exercise due diligence in investigating whether the suspicions were well founded. There is absolutely no indication in the record, however, of any particular attempt on Berkson's part to engage in discovery or make a "conscientious effort" to substantiate the suspicions he voiced to the district court in Louisiana in 1972. *See General Aircraft Corp.* v. *Air America, Inc.*, 482 F.Supp. 3, 8-9 (D.D.C. 1979). Conclusory allegations are not sufficient, *see Dayco*, 523 F.2d at 394; *Akron Presform*, 496 F.2d at 234; where a plaintiff has utterly failed to make even the requisite allegations, he cannot claim that his underlying cause of action was fraudulently concealed.

In the absence of a valid defense to the statute of limitation, the district court was correct in granting summary judgment for appellees on the ground that the action was time barred.

*Affirmed.* Costs awarded to appellees.

Supreme Court, U.S.
FILED
FEB 18 1989
JOSEPH F. SPANIOL, JR.
CLERK

(6)

NO. 88-1019

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

HERBERT D. BERKSON,
PETITIONER

V.

DEL MONTE CORPORATION, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

# BRIEF IN OPPOSITION OF RESPONDENT PRICE WATERHOUSE

JEFFREY B. RUDMAN
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10 pp

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## QUESTION PRESENTED FOR REVIEW

Whether petitioner Herbert D. Berkson's petition for a writ of certiorari should be denied and whether the unanimous decisions of the courts below that collateral estoppel and the statute of limitations bar petitioner's suit against respondent Price Waterhouse should thus stand.

## STATEMENT OF THE CASE

Respondent Price Waterhouse submits this brief in opposition to petitioner Herbert D. Berkson's petition for a writ of certiorari to the United States Court of Appeals for the First Circuit. The 13-year procedural history of this litigation is fully and accurately set forth in the brief submitted by respondent

United Brands Company, and Price Waterhouse adopts that brief by reference in its entirety and joins in all the arguments set forth therein.

## REASONS FOR DENYING THE WRIT

This case is not an appropriate one for this Court to exercise its discretion to grant certiorari. The petitioner's claims against Price Waterhouse were correctly dismissed on grounds of collateral estoppel and the statute of limitations by the courts below, and neither of the petitioner's two arguments supports the granting of certiorari as to Price Waterhouse.

I. BECAUSE PETITIONER'S ARGUMENT RAISES FOR THE FIRST TIME ALLEGED VIOLATIONS OF THE ANTI-DEFICIENCY ACT, CERTIORARI IS NOT PROPER.

The Petitioner raises for the first time in his Petition for Certiorari wholly new allegations of violations of the Anti-Deficiency Act. The Supreme Court, in Belcher v. Stengel, 429 U.S. 118 (1976), has held that certiorari is improper where a question is raised in a certiorari petition for the first time, such question not having been presented by the record. Certiorari is thus not available to petitioner Berkson in the case at bar: his claims as to Anti-Deficiency Act violations have never before been raised.

II. PETITIONER'S ARGUMENT CONCERNING THE TIMELINESS OF HIS RICO ACTION IS NOT MATERIAL TO PETITIONER'S CLAIMS AGAINST PRICE WATERHOUSE, AS THERE IS NO RICO CLAIM AGAINST PRICE WATERHOUSE.

Although the petitioner referred to the Racketeering Influenced and Corrupt Organizations Act ("RICO") in his complaint in this action, he did not attempt to make a RICO claim against Price Waterhouse. (A.I. at 12-13).[1]

Thus, the petitioner's argument for

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[1] [Citations to the two-volume Appendix shall be in the form "A.I. at 12-13" with the roman numeral designating the volume within which the material appears, and the arabic numbers designating the pertinent pages within that volume.]

certiorari based on an alleged error by the First Circuit in construing the RICO statute of limitations is not material to the petitioner's claims against Price Waterhouse.[2]

## CONCLUSION

Both the District Court and the United States Court of Appeals for the First Circuit dismissed the petitioner's claims on grounds of collateral estoppel and the statute of limitations. The petitioner has raised two

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[2] Even if the petitioner had advanced a RICO claim against Price Waterhouse, such a claim would be time-barred, as was decided unanimously by the courts below. Despite the petitioner's allegations in his petition for certiorari that he brought his RICO action within the statute of limitations period, both the District Court and the First Circuit Court of Appeals found that the petitioner's RICO claims were not brought within such time, and that the petitioner was not entitled to another opportunity to litigate the issue.

arguments to support his petition for certiorari: one is wholly inapplicable as it concerns the statute of limitations on a claim not raised against Price Waterhouse, and the other is not proper grounds for certiorari, because the question raised is a wholly new one, not presented by the record.

For these reasons, this is not an appropriate case for the exercise of certiorari. The petition should be denied.

Respectfully submitted,

Jeffrey B. Rudman
Counsel of Record
HALE AND DORR
60 State Street
Boston, MA 02109
(617) 742-9100

Dated: February 6, 1989

## CERTIFICATE OF SERVICE

I, Jeffrey B. Rudman, hereby certify that on the 6th day of February, 1989, I served three (3) copies of the within and foregoing Brief in Opposition of Respondent Price Waterhouse upon Herbert D. Berkson, 294 Washington Street, Suite 427, Boston, MA 02108 by first class mail, with postage prepaid thereon.

Jeffrey B. Rudman

Supreme Court, U.S.
FILED
FEB 15 1989
JOSEPH F. SPANIOL, JR.
CLERK

SUPREME COURT OF THE UNITED STATES

No. 88-1019 (7)

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OCTOBER TERMS, 1988

HERBERT D. BERKSON,

Petitioner

v.

DEL MONTE CORPORATION, ET AL,

Respondents

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

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# REPLY BRIEF OF PETITIONER

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14 pp

Other Defendant Parties

United Brands Company, William A. Rogers, Henry A. Kissinger, Price Waterhouse, Palmer & Dodge, Goodwin Procter & Hoar, Pillsbury, Madison & Sutro, Covington & Burling and Nathaniel Davis

## REPLY BRIEF OF THE PETITIONER

The petitioner hereby responds to the briefs in opposition to his petition for a writ of certiori.

### Brief In Opposition of Respondents, Palmer & Dodge and Pillsbury, Madison & Sutro.

On page 2:

> "In the lawsuit now before the Court petitioner sued United Brands, Del Monte Corporation, Henry Kissinger and a host of other defendants, including the law firms of Palmer & Dodge and Pillsbury, Madison & Sutro. Petitioner claims a 'Bananagate' conspiracy involving 'rogue' elements of the CIA, 'Mafia hit men' and the threat of assassination from the CIA itself.' .....(e.g., 'CIA disguises for Col. Oliver North,' 'Iran arms deal: the aftermath'."

The crude attempts at ridicule and jest by the counsel for Palmer & Dodge and Pillsbury, Madison & Sutro ironically enough underline and buttress the tragic happenings in our nation's capitol today, (e.g., the "Contragate" trial of Col. Oliver North). "Bananagate" and "Contragate" are inexorably linked, the one serving as the breeding ground and forerunner for the other. The petitioner

has steadfastly maintained that he has been victimized by the CIA and other elements of the American intelligence community in their questionable efforts to protect and shield the security of the United States. The petitioner is in strong accord with the mandate and purpose of the CIA, but not when its questionable activities deprive him of his property rights which are guaranteed by the Constitution of the United States.

The First Circuit Court of Appeals has sent a subliminal message to the Supreme Court in this matter by allowing a certain article that appeared in the Boston Globe on August 13, 1988, and is abstracted on pages 10-12 in his brief petitioning for certiorari. This Thomas Boylston Adams' article, tracing the covert activities in Central America of the intelligence community was considered sufficiently significant by the First Circuit Court of Appeals for it to forego its normal procedure of not receiving new evidence. There must have been a compelling reason for the First

Circuit to circumvent its own modus operandi.

This is mere conjecture on the petitioner's part, but he is of the opinion that because of the enormity of the "Contragate" matter with its roots intertwined around the very bedrock of the republic itself, the First Circuit Court of Appeals fearing that it might make the wrong decision in the petitioner's "Bananagate" matter, decided to let the matter go to the Supreme Court for the final decision so that there wouldn't be any conflicting decisions between "Contragate" and "Bananagate" at the Supreme Court level. In other words, let the Supreme Court make the ultimate decision on the petitioner's "Bananagate Affair".

The Supreme Court should grant the petitioner certiorari so that the facts of this matter, along with his allegations, can be heard in a public courtroom and not be hidden from the public view and scrutiny by the manipulations of these defendant attorneys as they lockstep from authority to authority

in their efforts to hoodwink and blind the Court by fallacy. Meaningless technicalities in the law are cited in a desperate effort by the private attorneys in this matter, along with the Government lawyers to conceal the truth. Is it not in the public interest as well as the petitioner's self-interest to bend a restrictive rule womewhat so that the truth can be arrived at? The public has a right to know and deeply scrutinize the covert activities of the CIA, NSC and the NSA in light of the fact that the Justice Department is attempting to subvert the public trial of Colonel Oliver North and the "Contragate" affair. The petitioner's "Bananagate" matter may be the only alternative that the public might have to investigate the inner workings of the intelligence community and the threats to the national interests that are embodied in the shadow, secret government of the Meeses and William Caseys that Colonel North testified to during the Senate Iran/Contra hearings.

The public must not be denied the opportunity to deeply scrutinize this secret government that might lead the American people down the path to totalitarianism. If the public is denied the opportunity to investigage this shadow government in the "Contragate" trial of Colonel North, if the Justice Department and the intelligence community has its way, then the only plausible alternative is for the Supreme Court to grant certiorari to the petitioner and let the inner workings of the CIA, NSA and NSC be aired out during his trial.

Brief in Opposition of the Respondent, United Brands Company.

On page 8

"Berkson raises for the first time in his Petition for Certiorari alleged violations of the Anti-Deficiency Act (the "Act"), 31 USC, Sect. 1341, et seq."

The petitioner states that this Anti-Deficiency Act violation was called to the attention of the Clerk of the First Circuit Court of Appeals with the request that he place the letter in the file of the panel con-

sidering the case. The counsel for respondent Covington & Burling also submitted to said panel a letter denying their violations of the Anti-Deficiency Act. The petitioner being pro se in this matter and not knowing all the proper professional legal language and procedures just did the best he could in bringing the matter to the attention of the First Circuit Court of Appeals.

On page 11a

"However, the Court of Appeals found that Berkson did not use due diligence in discovering the facts underlying his antitrust cause of action."

The petitioner states unequivocally that he did, in fact, use due diligence to substantiate his suspicions in the prior antitrust action, but the First Circuit Court of Appeals refused to reconsider its position when the petitioner called to its attention the proof of his due diligence and the proof of DelMonte's fraudulent concealment that rests in the record to this very day.

This proof is contained in an affidavit

of DelMonte's counsel in the prior antitrust action. Said counsel, Laurence M. Johnson, of Palmer & Dodge, admitted that on two occasions the petitioner accompanied by attorneys Francis Kenney and Samuel Angoff met with Attorney Johnson in Boston and confronted him with unconfirmed information and suspicions of DelMonte's wrongful acts in mid-1975, well within the parameters of 1972-1976 that DelMonte claimed was the statute of limitations in the antitrust matter. Mr. Johnson denied that his client was involved in any wrongdoing. This denial constituted fraudulent concealment by DelMonte and its counsel. Furthermore, Mr. Johnson made a gratuitous, reckless and perjurious statement, that the Court of Appeals was unwilling to recognize ... namely, that DelMonte never committed wrongful acts in Guatemala in 1972 and no proof ever existed that it did commit these acts. This perjurious statement, as well as DelMonte's corporate counsel, James

Crittenden's false statement in an interrogatory filed in June 18, 1981, were disclosed in DelMonte's internal documents produced by Court Order in May 1983. This was the first time the petitioner had the documentary and unrefuted proof of DelMonte's and its attorneys' guilt and fraudulent concealment. The Supreme Court's holding in Agency Holding, therefore, establishes the statute of limitations in this RICO matter as May 1983 to May 1987 and not as the Appeals Court established as September 1979 to September 1983. The First Circuit of Appeals, therefore, erred monumentally. If the petitioner had brought this suit at the time DelMonte and the First Circuit demanded in the order of June 29, 1988, the case would have been thrown out on summary judgment as it would have been based on mere unsubstantiated suspicions and hearsay with no evidence to support this suspicions.

Furthermore, the Appeals Court is countenancing perjury on the part of DelMonte

and its attorneys Johnson and Crittenden instead of turning the matter over to the US Attorney's Office for investigation and action if need be.

This RICO action was filed on September 26, 1986, well within the true statute of limitations of May 1983 to May 1987, as established by Agency Holding. Please see . ....

Brief In Opposition of the Respondent, Goodwin, Procter & Hoar.

On page 5 (footnote 5)

> "The current Petition refers to a May 1983 document production made during Berkson II by Palmer & Dodge on behalf of DelMonte.....Petitioner does not maintain that prior to May 1983 he was ignorant of his alleged injury.....Under such circumstances, it is not the rule that a statute of limitations is tolled until such time as the plaintiff's suspicions ripen during discovery."

The above statement made by Procter & Hoar in defense of itself and United Brands is another attempt by the defendant attorneys, acting as agents and surrogates of rogue elements of the Justice Department and the

American intelligence community, to hoodwink, mislead, snooker and euchre the Supreme Court with its legalistic and disingenuous leger-demain. The petitioner reiterates that without substantiating smoking-gun proof of DelMonte's wrongdoing obtained in DelMonte's internal documents of May 1983, his case would have been thrown out and he would have been sanctioned by the Court under Rule 11 for bringing a frivolous, meritless and vexatious action despite the efforts of defendant attorneys to blind the Supreme Court as they have been successful in accomplishing in the lower Courts.

Their actions are despicable and unacceptable, particularly at this time of the "Contra-gate" trial of Col. Oliver North. These defendant lawyers acting for themselves and the intelligence community are smokescreening from the public and the Supreme Court frightening facts that should rightfully be exposed. As officers of the Court, these defendant attorneys are

required to be honest, direct and candid with the tribunal, and they are not.

It should be abhorrent to all American citizens that the United States Department of Justice can be politically compromised and do the bidding of the special interest groups and power blocs that abound in the United States to the detriment of the public interest. The Justice Department as a co-conspirator in this "Bananagate Affair" should be rather committed to pursuing justice wherever it leads, even if the consequences are troubling. Over the long haul, only that approach will ensure that our true national security, which is largely dependent upon the integrity of our government institutions is protected.

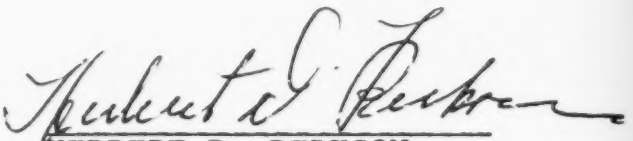
Respectfully submitted,

Herbert D. Berkson,
Petitioner (Pro-Se)

Dated: February 14, 1989

CERTIFICATE OF SERVICE

I, Herbert D. Berkson, hereby certify that on the 14th day of February 1989, I served three (3) copies of the within and foregoing Reply Brief of Petitioner upon all counsel fo record and the Solicitor General.



HERBERT D. BERKSON